(22,486)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 488.

MORRISDALE COAL COMPANY, APPELLANT,

vs.

PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. —.

MORRISDALE COAL COMPANY, Plaintiff-in-Error,

vs.

PENNSYLVANIA RAILROAD COMPANY, Defendant-in-Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

1 April Session, 1908.

Chester N. Farr, Jr.
Wm. A. Glasgow, Jr.
102
John G. Johnson

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

1908	March	3	Præcipe for Summons filed.
"	"	3	Summons exit returnable the first Monday of April, next.
"	"	11	Order for the appearance of John G. Johnson, Esquire, for defendant, filed.
"	April	6	Summons returned "served" and filed.
"	July	17	Statement of Claim filed.
"	"	17	Rule to Plead filed.
"	"	23	Plea filed.
"	September	1	Order to place case on Trial List filed.
1909	June	7	Order to place case on Trial List filed.
"	"	16	And now, to wit, a jury being called come, to wit (see minutes).
"	"	17	And the jurors aforesaid, upon their oaths and affirmations, respectively do say that they find as follows:
			We find as a fact that the amount of the plaintiff's claim is correct and is contained in its exhibit 2, and is:
			Principal $51640.60
			Int. 15515.49
			Total $67156.09

2			Said amount being ascertained in the way and manner in said exhibit set forth together with the evidence explaining and referring to the same.
			If the court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the court the plaintiff may be entitled to recover.
			If, however, the court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant.
"	"	29	Motion for judgment on behalf of plaintiff filed.
			Argued.
1910	January	31	Motion to dismiss action for want of jurisdiction filed.
			Argued.
"	February	5	Opinion, McPherson, J., granting defendant's motion to dismiss for want of jurisdiction filed.
"	"	8	Order of allowance of exception to plaintiff filed.
"	"	10	Præcipe for judgment in favor of defendant and against plaintiff filed. Judgment accordingly.
			Bill of Exceptions filed.
			Assignments of error filed.
			Petition for writ of error filed.
3			Order allowing writ of error filed.
			Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
			Citation allowed and issued.
			Bond sur writ of error filed.
			Order approving bond sur writ of error filed.
			Citation returned "service accepted" and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Morrisdale Coal Company, Plaintiff, and Pennsylvania Railroad Company, Defendant, a manifest error hath happened, to the great damage of the said Morrisdale Coal Com-

pany, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days,
4 in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 10th day of February, in the year of our Lord one thousand nine hundred and ten.

[SEAL.] GEORGE BRODBECK,
Deputy Clerk of the Circuit Court of the United States.

Before McPHERSON, *J.*

Allowed.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Pennsylvania Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia, within thirty days, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein Morrisdale Coal Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered
5 against the said Plaintiff in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. McPherson, Judge, holding Circuit Court of the United States this 10th day of February, in the year of our Lord one thousand nine hundred and ten.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

Service accepted.
JOHN G. JOHNSON,
Attorney for Defendant in Error.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Clerk of the United States Circuit Court.

SIR: Issue Summons in Trespass returnable first Monday of April.

CHESTER N. FARR, JR.,
WILLIAM A. GLASGOW, JR.,
Attorneys for Plaintiff.

March 3, 1908.

6 (Endorsed: Circuit Court of the U. S. E. D. of Pennsylvania. No. 102 of April Term, 1908. The Morrisdale Coal Co. vs. Pennsylvania Railroad Company. Præcipe for Summons. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., pro plaintiff.)

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

The President of the United States to the Marshal of the Eastern District of Pennsylvania, Greeting:

We command you, That you summon Pennsylvania Railroad Company, late of your District, if it may be found therein, so that it be and appear before the Judges of the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, at a Session of the same Court to be holden at Philadelphia, on the first Monday of April next, to answer to The Morrisdale Coal Company in a plea of Trespass. And have you then there this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 3rd day of March, A. D. 1908, and in the 132nd year of the Independence of the United States.

[SEAL.]

GEORGE BRODBECK,
Deputy Clerk of Circuit Court U. S.

MARCH 3RD, 1908.

At Philadelphia, in my District, served the within writ on Pennsylvania Railroad Company by giving a true and attested copy thereof to Kane S. Green, Assistant Secretary of said com-
7 pany, and making known the contents of the same to him.

So answers

JOHN B. ROBINSON,
U. S. Marshal,
Per ABRAM B. MYERS,
Deputy.

(Endorsed: No. 102. April Session, 1908. Circuit Court United States. Eastern District of Pennsylvania. The Morrisdale Coal Company vs. Pennsylvania Railroad Company. Summons. Trespass. Returnable on the first Monday of April next. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., Attorneys for Plaintiff. Filed Apr. 6, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Enter my appearance for defendant in the above case.

JOHN G. JOHNSON,
Attorney for said Defendant.

11th March, 1908.

To Clerk of said Court.

8 (Endorsed: No. 102. April Term, 1908. U. S. C. C. Morrisdale Coal Co. vs. Pennsylvania R. R. Co. Order for Appearance. John G. Johnson, Attorney for Defendant. Filed Mar. 11, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Plaintiff's Statement of Claim.

The plaintiff, The Morrisdale Coal Company, claims of the defendant, Pennsylvania Railroad Company, the sum of Two Hundred and Fifty Thousand (250,000) Dollars for injuries inflicted upon the said plaintiff by the said defendant, whereof the following is a statement:

The defendant, the Pennsylvania Railroad Company, a railroad corporation chartered under the laws of the State of Pennsylvania, is a common carrier, and owns and operates standard gauge railroads in the States of Pennsylvania, Maryland, New Jersey, Delaware and New York, and as such common carrier is engaged and employed in the transportation of property and passengers, including coal,

over its said railroad from the coal mines in the State of Pennsylvania, and from other States, to various large cities and
9 places in the above-named States and elsewhere; and delivers coal in cars to other railroads to be carried to other States and more distant points; and delivers and carries coal from such mines as are located upon its road in the State of Pennsylvania to the Great Lakes on the north and tidewater on the east; and as such common carrier is engaged in interstate commerce and is subject to the provisions of an Act of Congress entitled "An Act to regulate Commerce," duly approved February 4, 1887, and to the several acts amendatory and supplemental thereto.

The Morrisdale Coal Company, the plaintiff in this action, is a corporation created and existing under the laws of the State of Pennsylvania, and now owns a tract of land of about three thousand (3,000) acres situated in what is known as the "Clearfield Coal Region" in the County of Clearfield, State of Pennsylvania; and operates, and has, since 1900 and long prior thereto, operated a coal mine or coal mines upon said property on the line of the said Pennsylvania Railroad in the said Clearfield Coal Region in the State of Pennsylvania; and is engaged in selling and shipping coal mined by it, and forwarding the same for sale in the various markets in other States than the State of Pennsylvania and reached by the said Pennsylvania Railroad and its railroad connections; whereby the plaintiff became and was and is a shipper of the said railroad company, delivering coal to it for shipment as aforesaid; and the said Pennsylvania Railroad Company was and is engaged in the business of receiving coal so delivered to it by the said Morrisdale Coal Company, and in forwarding the same over its line of railroad to the lines of its connecting railroads for a continuous carriage or shipment to the various markets in other States than the State of Pennsylvania during the time mentioned herein and at the present time.

The plaintiff avers that the said district known as the
10 Clearfield Coal Region was, during the time herein mentioned, occupied by a great number of other mines or collieries, which mines or collieries also shipped their coal for the purpose of interstate commerce over the Pennsylvania Railroad to the lines of its connecting railroads in other States for a continuous carriage or shipment to the various markets in other States than the State of Pennsylvania during the time mentioned herein; and the said mines and collieries were all competitors with the plaintiff company in the various markets in other States than the State of Pennsylvania, and to tidewater on the east.

The only available outlet for the coal mined by the Morrisdale Coal Co. from its mines on the line of the Pennsylvania Railroad and so shipped from said mines to the markets outside the State of Pennsylvania, was and is by way of the Pennsylvania Railroad and the connections thereof.

During the time mentioned herein and now it was and is unlawful for the said Pennsylvania Railroad Company to give any undue or unreasonable preference or advantage to any particular

person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and it was the duty of the said Railroad Company during the time hereinafter mentioned and now, to offer all reasonable, proper, sufficient and equal facilities to all shippers of coal over its said railroad or line, and to make a fair and proportionate distribution of its car supply and other vehicles and all instrumentalities and facilities for shipment and carriage, irrespective of ownership or contract, express or implied, for the use thereof, for the accommodation of all shippers alike in the said district hereinbefore described. And it was
11 also the duty of the said Railroad Company to distribute all cars in service on its road fairly and proportionately to the said coal mines on, and to shippers of coal over, its said railroad.

Plaintiff avers that for a period beginning January 1, 1900, and ending the last day of December, 1905, the Pennsylvania Railroad Company, defendant, for the purposes of arranging its own car distribution in the said Clearfield Coal Region among the mines and collieries aforesaid, which included those operated by the plaintiff, had rated the capacity of said mines and collieries to produce coal and offer the same for shipment in the said district, at about eighteen thousand (18,000) or nineteen thousand (19,000) tons of output per day; and the said defendant, the Pennsylvania Railroad Company, apportioned to each mine or colliery in the said district a certain percentage of the cars assigned for the transportation of coal in said district by the Pennsylvania Railroad Company, defendant; the said apportionment being rated by the Pennsylvania Railroad Company upon the capacity as calculated by it of each mine or colliery in the said district; and in accordance with the said rating made by the said Pennsylvania Railroad Company, defendant, the plaintiff was scheduled by the said defendant to receive as its daily allotment of cars, during the above period of time, a certain number of the cars in the said district, the said daily allotment varying from time to time in accordance with the estimate placed by the said defendant upon the capacity of the mines of the said plaintiff as compared with the capacity of the other mines and collieries above enumerated situated in the said Clearfield Coal Region, and also with the variations in the number of cars actually placed in said district by the defendant Company, the said cars being used, or being intended to be used, not only for the transportation of coal to points within the State of Pennsylvania, but also for the transportation of coal
12 from the State of Pennsylvania to other States and countries, or for the purposes of interstate commerce. Nevertheless, plaintiff avers that the defendant, in violation of its duty to the plaintiff to see that no undue or unreasonable preference or advantage was given to any person, company, firm, corporation, or locality in the said district, or to subject any particular person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage, failed and refused to assign to the Clearfield Coal Region

for use therein the fair proportion of the entire number of coal cars of said Railroad Company to which said Region was entitled, and to deliver to the plaintiff on reasonable demand being made therefor by the plaintiff, the plaintiff's due proportion or daily allotment of cars which were or should have been assigned by the defendant to shippers in the said Clearfield Coal Region for the transportation of coal, which pro rata allotment of cars the said Pennsylvania Railroad Company, the defendant, should have sent to the plaintiff's mines for the purposes of plaintiff's shipments of coal, as before set forth.

Plaintiff avers that the said failure to so deliver to the plaintiff its proper daily allotment of cars was continued throughout the years from the beginning of 1900 to the close of 1905, as above set forth; that the effect of the said default on the part of the said defendant Company was to subject the plaintiff to an undue or unreasonable prejudice or disadvantage with respect to the facilities for shipping coal offered to the said plaintiff as contrasted with the facilities for shipping coal offered by the said Pennsylvania Railroad Company, the defendant, to the other shippers of coal, competitors of the said plaintiff and situated in the said Clearfield Coal Region. And further, by the failure on the part of the defendant to give to the plaintiff its proper allotment of cars during the period aforesaid,

13 undue and unreasonable preferences and advantages were given to the other mines and collieries in the said Clearfield Coal Region and to shippers in other Coal Regions, over the plaintiff, in that the said mines and collieries were thereby accommodated with car supply and facilities for the shipment of coal greater than that which should be properly allotted to them when compared with the facilities allotted to the plaintiff; and as a result of the said unfair discrimination, the subjection of the plaintiff to the said unreasonable prejudice and disadvantage, and said failure on the part of the defendant Company to give to the plaintiff its proper proportion of the car supply of the said district, a proper allotment of cars for the shipment of coal, and equal facilities with all other shippers in said district for the shipment of coal, the said plaintiff was obliged to buy coal at various times during the years aforesaid, in the outside market, and at the prices then prevailing, for the purpose of fulfilling its contracts which it had entered into at various times during the said year, it being rendered impossible for the said plaintiff to fulfill its said contracts by coal mined in its own mines in the said Clearfield Coal Region by reason of the failure, as set forth above, of the defendant Company to supply it, the plaintiff, with its proper proportion and allotment of cars for the shipment of the said coal.

Plaintiff avers that all of the said coal which it was required to ship by the aforementioned contracts entered into by it during the above years, was coal to be shipped to States other than the State of Pennsylvania, or to foreign countries, and that consequently said shipments were properly subjects of interstate or foreign commerce.

Plaintiff avers that if it had been supplied with the proper amount of cars, or such amounts of cars as were allotted to it at different

times during the above years on the schedule of the Pennsylvania Railroad Company as its proper proportion of the car supply then in the Clearfield Coal Region, it would have been able to fill
14 its contracts by the mining of coal at its mines and the shipping of the same at much cheaper prices than the prices which it was compelled to pay in the open market for the purpose of fulfilling the obligations of its contracts.

Plaintiff avers that by reason of the above defaults on the part of the defendant Company it has suffered damages to the extent of Two Hundred and Fifty Thousand (250,000) Dollars, as aforesaid.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

F. H. Wigton, being duly sworn according to law, deposes and says that he is the President of the Morrisdale Coal Company, the corporation plaintiff in the above statement, and that as such he has full knowledge of the facts set forth therein, and that the facts set forth therein are true.

F. H. WIGTON.

Sworn to and subscribed before me this 17th day of July, A. D. 1908.

[SEAL.] IRWIN SHUPP, JR.,
Notary Public.

My commission expires January 16, 1909.

(Endorsed:) C. C. of U. S. for E. D. of Penn. No. 102 of April Sessions, 1908. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Plaintiff's Statement of Claim. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., pro plaintiff. Filed Jul. 17, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.

15 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Rule to Plead.

To the Clerk of the Circuit Court.

SIR: Enter rule on the defendant in the above case to plead within fifteen (15) days or judgment according to law.

CHESTER N. FARR, JR.,
WILLIAM A. GLASGOW, JR.,
Attorneys for Plaintiff.

July 17th, 1908.

(Endorsed: Circuit Court of the United States, Eastern District of Pennsylvania. No. 102 of April Sessions, 1908. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Rule to Plead. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., pro plaintiff. Filed July 17, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

16 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Pleas.

The defendant in the above case pleads "Not Guilty" and "Actio non accrevit infra sex annos."

JOHN G. JOHNSON,
Attorney for Defendant.

To the Clerk of the Circuit Court.

July 22nd, 1908.

(Endorsed: 102. April Term, 1908. U. S. C. C. Morrisdale Coal Company vs. Pennsylvania R. R. Co. Pleas. John G. Johnson. Filed July 23, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.)

And afterwards, to wit, on the 16th day of June, 1909, a jury being called, comes to wit:

A. J. Odenwelder.	Frederick Blacker.
Jay Bachman.	John K. Harding.
Solomon J. Pusey.	Elwood H. James.
Milton Mendenhall.	Norman D. Maule.
D. D. Fisher.	J. K. Rabonold.
John C. Dessalet.	John J. Cameron.

17 who are respectively sworn or affirmed to try the issue joined.

And afterwards, to wit, on the 17th day of June, 1909, the jurors aforesaid upon their oaths and affirmations, respectively do say that they find as follows:

We find as a fact that the amount of the plaintiff's claim is correct and is contained in its exhibit, and is

Principal	$51,640.60
Int.	15,515.49
Total	$67,156.09

Said amount being ascertained in the way and manner in said exhibit set forth together with the evidence explaining and referring to the same.

If the Court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the Court the plaintiff may be entitled to recover.

If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant.

18 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Bill of Exceptions.

Be it remembered, that in the said April Sessions came the plaintiff into the said Court and impleaded the said defendant in a certain action of trespass, etc., in which the said plaintiff declared (Prout narr.) and the said defendant pleaded (Prout plea). Thereupon issue was joined between them. And afterwards, to wit, at a session of the said Court held at the County of Philadelphia for the Eastern District of Pennsylvania, aforesaid, before the Honorable John B. McPherson, Judge of the said Court, on November 16th and 17th, 1909, the said issue between the said parties came to be tried by a jury of the said District, for that purpose duly impaneled (Prout list of jurors), and at which time came as well the said plaintiff as the said defendant by their respective attorneys, and jurors of the jury aforesaid impaneled, to try the said issue, being duly also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff, and the counsel of the said defendant offered in evidence to the jury the following evidence (Prout stenographer's transcript of evidence):

19 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Before Hon. John B. McPherson, J., and a Jury.

PHILADELPHIA, PA., TUESDAY, *November 16th*, 1909.

Present:

Chester N. Farr, Jr., Esq.,
William A. Glasgow, Jr., Esq., for Plaintiff.
Francis I. Gowen, Esq.,
John G. Johnson, Esq., for Defendant.

Plaintiff's Evidence.

FRANK H. WIGTON, having been duly sworn, was examined and testified as follows:

By Mr. GLASGOW:

Q. Where do you live
A. Philadelphia.
Q. How long have you lived in Philadelphia?
A. Since 1865.
Q. Have you any connection with the Morrisdale Coal Company?
A. I have.
Q. What?
A. I am today the president of the Morrisdale Coal Company.
20 Q. How long have you been connected with that company?
A. Since 1895.
Q. What is the business of that company?
A. Mining bituminous coal, shipping it into the market, and selling it.
Q. Where is the coal from the mines of the Morrisdale Coal Company shipped? To what point?
A. The mines are located in what is known as the Clearfield Region, Clearfield County, Pennsylvania, on the line of the Pennsylvania Railroad.
Q. The Tyrone Division?
A. On what is known as the Tyrone Division. They also have other mines, that are not on the Pennsylvania Railroad.

Q. But the mines that are the subject of question here are located in the Clearfield region, on the Tyrone Division?

A. Yes.

Q. Where is the coal that you mine there shipped to, principally? To what destination?

A. Shipped to New York and New England—New York ports.

Q. What part of it is shipped outside of the State of Pennsylvania?

A. I should say ninety-eight or ninety-nine per cent.; practically all.

Q. How many mines, beginning with March, 1902, was the Morrisdale Coal Company operating in the region to which you have referred?

A. They were operating at Morrisdale a shaft known as Morrisdale No. 2. They were operating a drift mine, some distance from that, in the same region, known as Mabel, and subsequent to the date you have mentioned they were operating a drift mine called Madiera, about 20 miles from the Morrisdale shaft?

Q. All of those were in the Clearfield region?

A. They were.

21 Q. And served by the Tyrone Division of the Pennsylvania Railroad?

A. They are.

Q. Is there any other railroad there to serve those mines?

A. Not for those mines.

Q. I say, for those mines?

A. No.

Q. Who had, at that time, beginning with March, 1902, the general supervision and control and direction of the operations, both mining and selling of the Morrisdale Coal Company?

A. I had at that time, 1902.

Q. You had during and down to December,—including December, 1905, did you?

A. I had.

Q. As I understand the situation, when there is no car shortage—when all the cars that the mines demand in the coal region are assigned to that region, there is no difficulty or trouble about shipping the coal? What I mean is, the trouble covered by this case does not arise during the period when all the mines were furnished the cars to which they were entitled?

A. When all the mines had what cars they wanted——

Q. You do not understand the question. Your claim arises in March, 1902?

A. Yes.

Q. And for the periods covered by your claim, are only periods when there is a car shortage in the field?

A. That is correct.

Q. During the time there is not a car shortage, there is no complaint covered by this proceeding?

A. There is not.

Q. What do you mean by car shortage?

A. When there are insufficient cars to meet the requirements or demands of the several operators in the field.

22 Q. In the territory?

A. Yes.

Q. Will you explain to the jury, when there are not enough cars for filling the requirements of the shippers in the district or region, how are the cars divided that are available for shipment by the Pennsylvania Railroad Company?

A. The Pennyslvania Railroad Company establish a capacity for each colliery in the district.

Q. They do that with their own engineers or men?

A. They do that entirely of their own initiative, by themselves Having established this rating, the aggregate of that rating is called the capacity of the region.

Q. You mean the capacity of shipping coal?

A. The capacity to mine and ship coal and whatever proportion your rating bears to the one hundred percentage of aggregate, is your proportion of the car supply which they furnish, and it is divided in that way.

Q. And that is worked out to a percentage basis, is it?

A. It is.

Q. And to each of the mines in the territory is assigned a percentage of the equipment for distribution?

A. There is.

Q. Beginning with March, 1902, or previous thereto, was the Morrisdale Coal Company ready or able to ship the coal which it would have been entitled to ship if the cars up to its capacity or percentage had been furnished to them?

A. The Morrisdale Coal Company, from the collieries located in that district, at all times was able to produce and ship more coal than was even assigned to them as the capacity by the Pennsylvania Railroad Company.

Q. Had you prior to March, 1902, been given cars even

23 more than the percentage to which you were entitled, could you have filled them?

A. We not only could fill them, but when occasion arises in which cars were abandoned in that region, the railroad company gives us the cars in excess of what would have been our regular capacity, and they were loaded and shipped to the market.

Q. That is when other people did not want them?

A. When they did not require them.

Q. Or did not require them, then the Pennsylvania Railroad Company turned them over to you?

A. Yes.

Q. You would fill them and ship them yourself?

A. We did.

Q. Beginning with March, 1902, have you had a statement made up from the distribution sheets of the Pennsylvania Railroad, showing the cars in the field and the assignment thereof to the Morrisdale Coal Company, or what part was assigned to that Company?

A. I have.

Q. Will you please tell the jury what would be the effect upon your company of the failure to furnish you the cars to which you were entitled under your percentage, or to furnish irregularly cars to you under your percentage?

A. The not furnishing of cars up to the percentage, which is what the coal operator is entitled to base his calculation upon, would result in his being unable to fill his own coal obligations that he in all probability had entered into for delivery of coal, and to comply with those obligations, he would be forced to go into the market and purchase coal on the best terms and at the best prices that he could, to carry them out. Another factor arises from insufficient and irregular supply of cars, which prevents the regular working of the colliery, and a colliery such as the Morrisdale shaft, which is equipped for a large output, far in excess of even the capacity which the railroad company has rated, has to keep
24 in constant operation, the pumps have to be kept going constantly, to keep the water out, so that your firemen, your engineers, your pumpers, your superintendents, and all that apply to the preservation and conduct of the mine, when kept in idleness, increases the cost of the coal when it is produced, far in excess of what it should be if it was worked with a degree of regularity, with the proper supply of cars.

Q. Prior to March, 1902, and thereafter, were you constantly in communication with the Pennsylvania Railroad Company on the subject of additional car supply?

A. So constantly that it almost seemed daily, until I suppose they grew as tired of me as I was of going to see them.

Q. Did you inform them of your having contracts to fill?

A. I did, repeatedly.

Q. And that cars were required for that purpose?

A. I did, yes.

Q. Did you keep that up after March of 1902, and down to December, 1905, during the periods covered by your statement?

A. I did.

Q. Giving them the same information?

A. Constantly.

Q. The Pennsylvania Railroad Company had car distribution sheets made up daily for the distribution of cars, did they not, showing the distribution?

A. They had.

Q. Have you seen those sheets?

A. I have, within recent months.

Q. Did you have a statement made up from those sheets, showing, during the period of March, April, May, June, July, August, September, October, November and December, 1902, January, February, May and June, 1903, January, 1904, January,
25 March, May, June, September, October, November, December, 1905, made up showing the total number of cars in that Clearfield region, steel cars or other cars—the total number of wooden cars in the region, and what was assigned to the Berwind-

White Coal Mining Company, and what was assigned to the Morri dale Coal Company in that region, during the period I have men tioned?

A. I had such a statement made up from the sheet furnished t our representative by the Pennsylvania Railroad Company, an summarized in the way you have just outlined.

Q. Was that statement made under your direction?

A. It was.

Q. And observation?

A. Yes.

Q. You compared it with the sheets?

A. I did.

Q. In that statement, which I will refer to in a moment, the cars are spoken of on the distribution sheets as steel cars and wooden cars. Have you any information as to how the steel cars and wooden cars are treated, as far as which is the standard of car distribution in the field?

A. During a portion of that time, the early part of that time, the Pennsylvania Railroad Company considered a wooden car, estimated to carry 25 tons, as the standard, and when a steel car was supplied, it was considered equivalent to two wooden cars. In the latter part of that time, the exact time I am not able to say, they changed that, and called the standard of wooden cars 35 tons, and the steel car was equivalent to one and a half wooden cars, and it was all figured out on the basis of wooden cars.

Q. So that if you got a steel car, or if anybody else got a steel car during the period you have spoken of, the first period, it would be charged as two cars?

A. Yes.

Q. And if you got a steel car during the second period
26 you spoke of, it would be charged as one and a half cars?

A. It would, yes.

Q. You got that information from the Pennsylvania Railroad Company's office?

A. From the Pennsylvania Railroad Company.

Q. I ask you to look at this statement. During the months of March, April and May of 1902, you make no claim for damage in this case?

A. We do not.

Q. During those months the Pennsylvania Railroad Company furnished you more cars than your percentage called for?

A. They did.

Q. And you filled them?

A. We did.

Q. And shipped coal?

A. Shipped coal to market.

Q. Beginning with the month of June, 1902, can you tell us how many, according to the distribution sheets of the Pennsylvania Railroad, steel cars were in that Clearfield region?

Mr. GOWEN: I think it is only fair, before any testimony is

given by Mr. Wigton from this statement, that we should clearly have it explained how this statement is made up.

The COURT: You may examine the witness on that point yourself, unless Mr. Glasgow will do it.

Mr. GLASGOW: I do not know the particular point that Mr. Gowen wants to know about.

The COURT: Mr. Gowen had better do it himself.

Mr. GLASGOW: I am perfectly willing that Mr. Gowen should do it. The point that Mr. Gowen calls my attention to is
27 this: This statement is made up from the basis of what we consider to be the law of this case, that in the distribution of cars to coal mines upon the rated capacity basis, that such cars as are available for shipment of coal should be counted in the distribution. Mr. Gowen, as I understand it, claims that that proposition is not a correct one, and that there are certain cars that should not be counted in the distribution, among them fuel cars for use of the Pennsylvania Railroad, and some other individual cars of mines, of shippers in that territory. I think that is a matter of defence, however, on the part of Mr. Gowen. I am showing by this statement the total number of cars in the field. Mr. Gowen says that the statement is correct, as to the total number, but that the fuel cars should not be counted, and should be deducted from the total that I have got there. I think that is a matter of defence, which he should bring out hereafter, if it is his reliance.

The COURT: At present, I suppose all that Mr. Gowen wants to know, as I understand it, is to inquire how the statement was made up.

Mr. GLASGOW: That was the point to which he addressed me.

The COURT: Mr. Gowen may examine the witness, and then we will see as we go on just what is brought out.

By Mr. GOWEN:

Q. (Sheet shown witness.) That is one of the sheets to which you have been referring?

A. I think it is, yes.

By Mr. JOHNSON:

Q. They are all made on the same basis as that sheet?

A. Yes.

28 By Mr. GOWEN:

Q. Showing the distribution of cars made on June 2nd, 1902?

A. Yes.

Q. And the sheets for all other days, so far as you are aware, agree in form with this sheet that I have shown you?

A. Yes.

Q. They all agree with that?

A. So far as I know, yes.

Q. These sheets show what? The character of cars delivered at the various mines in that region?

A. They do.

Q. Just refer to the sheet. State what different kinds of cars were delivered there.

Mr. GLASGOW: I object. I am going to show by this witness the total number of cars. Mr. Gowen should take up the cross-examination of the witness regularly.

Mr. GOWEN: I want to show whether, in this statement he has prepared, he has shown the various kinds of cars, or whether he has massed them all together.

Mr. GLASGOW: That is what the statement shows, the total cars.

Mr. GOWEN: I want him to state that.

The WITNESS: That is what the statement says.

By Mr. GOWEN:

Q. What does this sheet show as to the character of cars delivered at the various mines in the Tyrone region on June 2, 1902?

Mr. GLASGOW: I object to that, because it is going beyond the point.

29 Mr. GOWEN: I want to show there were cars delivered of a different character.

Mr. GLASGOW: Don't you think that you should bring that out when you cross-examine my witness, after I am through with him?

The COURT: It is really a matter of indifference, I think, when it comes out.

Mr. GOWEN: Unless we know how this statement is made up, it is going to be very confusing to the jury, I am satisfied. I want them to understand how the statement was prepared.

Mr. GLASGOW: I will state, as Mr. Wigton has stated, that this statement is prepared and gives the total number of cars in the region each month for the shipment of coal.

Mr. GOWEN: If you will say in addition to that, that it includes the individual cars belonging to certain shippers, that it includes the fuel cars placed by the Pennsylvania Railroad Co. for its own supply, and fuel cars of foreign railroads, consigned to mines on the Tyrone Region for their supply——

Mr. GLASGOW: If that is a fact—I mean, if there are any such cars on the sheet, then our statement embraces those. It includes everything on the sheet.

The COURT: With that understanding, that is all you want at this point. Let us have a clear understanding about this synopsis of the summary, whatever it may be called, that the witness has in his hand. It is made up, as I understand it, from figures that appear upon the railroad distribution sheets, and from no other source.

Mr. GLASGOW: No other source.

30 By Mr. GLASGOW:

Q. These figures on the statement which you have in your hand, which I will subsequently offer in evidence,—this statement is made entirely from the figures on the distribution sheets for the period noted on that statement of the Pennsylvania Railroad?

A. It is.

By the COURT:

Q. And only from that source?
A. Only from that source.

By Mr. GLASGOW:

Q. And the statement under the head of "Total wooden cars in region," gives the total number of cars in the region, for the shipment of coal, or loading with coal, under the seven months set opposite to it, in wooden cars?

A. Under the heading "Total wooden cars in region" is the summary of the months—daily reports of the Pennsylvania Railroad Company, in which a wooden car is counted as one, and a steel car is counted as the equivalent of so many wooden cars. At one time, two wooden cars, and at another time one and a half wooden cars.

Q. Take, for instance, under the head of June 11th, 1902. There appears under the heading "total cars in region, steel, 1191. Others 5411," and under the heading "Total wooden cars in the region" is 7793. In order to arrive at that total, you multiply the number of steel cars, 1191, by two, and to that add 5411, other cars, making a total of 7793?

A. Yes.

Q. As wooden cars in the region?

A. That is the way it worked out, yes, sir.

Q. That is the way it is worked out, all through the statement?

A. It is; yes, sir.

31 Q. The actual number of cars in the region would be the number of steel cars, 1191, and the number of other cars, 5411, added together?

A. Numerically, that would be so.

Q. But the distribution of the Pennsylvania Railroad Company was made at that time on the basis of a steel car being equal to two wooden cars?

A. It was.

Q. And the 7793 represents the number of cars in the region in June, 1902, in terms of wooden cars?

A. It does.

Q. Taking for the month of June, 1902, you have given in that statement the percentage of rating and of cars received, and the total cars in the region, in wooden cars, and the shortage or excess which may have been received on the percentage, by the Berwind-White Coal Mining Company and by the Morrisdale Coal Company?

A. It is so shown.

Q. During the months of March, April and May, 1902, you were rated for car distribution at 4.2 per cent. for March, April and May. Is that correct?

A. That is correct.

Q. And part of May——

A. The rating appears to have been changed in the month of May.

Q. By which your rating was increased to 4.8 per cent.?

A. It was.

Q. During those months, March, April and May, you received all you were entitled to under your percentage of total cars in that region?

A. We did.

Q. And in excess of that?

A. And in excess.

Q. And loaded them?

A. We did.

Q. And shipped them?

32 A. We did.

Q. Let us begin with the month of June, 1902. The total wooden cars in the region during that month was 7793?

A. It was.

Q. Is that correct?

A. That is correct.

Q. And of that, under the percentage rating, what percentage were you entitled to?

A. 4.8.

Q. Is that from the distribution sheets of the Pennsylvania Railroad?

A. That is taken from the Pennsylvania Railroad distribution sheet.

Q. You received steel cars 88, and others 75, making a total of what, in wooden cars, received by you during that period?

A. 251.

Q. Based upon the total number of wooden cars in that region during that month, and your percentage of 4.8, how many cars were you entitled to—wooden cars, during the month of June, 1902?

A. 374.

Q. What was the shortage?

A. 123.

Q. 123 wooden cars less the difference you were entitled to receive under the percentage?

A. Under that percentage less than we were entitled to receive.

Q. And that is how many tons of coal that may have been shipped in those cars?

A. Equivalent to 3,075 tons.

Q. That is on the basis of 25 tons to the car?

A. It is.

Q. Is that the rating of the Pennsylvania Railroad Company of wooden cars?

A. Yes, that is the rating of the Pennsylvania Railroad Company.

33 Q. As to wooden cars?

A. Yes. It was at that time, 25 tons.

Q. In order to get at the total wooden cars which you were entitled to in the month of June, you take 4.8 per cent. of total wooden cars in the region?

A. That is the way it was calculated.

Q. And in order to get at the total wooden cars you received during that month, you take the steel cars, of which you received 88, multiplied by two, and to that result add 75 other cars which you did receive, making a total of 251?

A. We do, yes, sir.

Q. All of those figures as to cars received by you, and the percentage you are entitled to, are from the distribution sheets of the Pennsylvania Railroad?

A. They are made entirely from the distribution sheets furnished us by the Pennsylvania Railroad for inspection and the making of this summary.

Q. During the month of June, 1902, what was the percentage to which, according to the distribution sheets of the Pennsylvania Railroad, the Berwind-White Coal Mining Company was entitled?

A. 19.4, and changed apparently in the month to 19.3.

Q. Per cent?

A. Per cent.

Q. That is of total cars in the region?

A. Of total cars.

Q. Worked out upon the same basis, you worked out from the distribution sheets, the amount of cars which you received in that month, and the amount which you were entitled to, worked on the same basis, did the Berwind-White Coal Mining Company receive more cars or less in that month than they were entitled to under their percentage?

A. They received 197 cars in excess of their percentage.

Q. 197 in excess of their percentage?

34 A. Yes.

Q. And you received 123 less than your percentage?

A. We did.

Q. Beginning with the month of June, 1902, was there any improvement or decrease in the market conditions as to coal?

A. There was a very decided improvement, or increase, in the market value of coal, because the anthracite strike, which occurred in 1902, was beginning to make itself felt in June.

Q. And while, during the three months, March, April and May, you had gotten sufficient cars, beginning with June, did you, for the rest of that year, get what you were entitled to on the percentage basis as shown by the sheets of the Pennsylvania Railroad?

A. We did not.

Q. During each of seven months following June, 1902, to wit, July, August, September, October, November and December, 1902, have you worked out, upon the same basis as I have given to you as to June, the total shortage each month in cars and in tons?

A. We have.

Q. Which you received less than you were entitled to under your percentage?

A. We have.

Q. During each of those months you were short on the percentage to which you were entitled?

A. We were.

Q. Have you worked out on this statement the same for the Berwind-White Coal Mining Company?

A. We have.

Q. During the same months, June, July, August, September, October and November, 1902, was the Berwind-White Coal Mining Company under or above what it was entitled to under its percentage?

A. They were above what they were entitled to under their percentage, with the exception of the month of August, when they were three cars short of their percentage.

Q. For the month of June, how much were they in excess?

A. 197.

Q. July?

A. 226.

Q. The shortage in August was three?

A. Three.

Q. In September how much were they in excess?

A. 48.

Q. October?

A. 64.

Q. In excess?

A. In excess.

Q. November, in excess?

A. 466.

Q. December, in excess?

A. 364.

Q. Was the price of coal in the market increasing or decreasing?

A. Increasing very rapidly as the year advanced.

Q. For those months you have worked out on this statement, which I am going to offer in evidence, the number of tons you were short each month on the percentage that you were entitled to?

A. We have.

Q. Now, beginning with January, 1903. For January, 1903, were you in excess of, or short of the number of cars which you were entitled to under the percentage?

A. We were short.

Q. How much?

A. 10 cars.

The COURT: If I may suggest, instead of asking these questions, why does he not read the statement off, or let somebody else read it off? We will save a great deal of time in that way.

Mr. GLASGOW: I am not going to pursue this very long.

By Mr. GLASGOW:

Q. Then I will ask you, does this statement, for the period which you claim damages in this case, show the same comparison between the excess or shortage, as the case may be, of cars on percentage, furnished to your company and furnished to the Berwind-White Coal Mining Company?

A. It does.

Q. And is this statement correct, as far as the distribution sheets of the Pennsylvania Railroad Company show?

A. It is a summary of those distribution sheets.

Mr. GLASGOW: We offer this paper in evidence.

Mr. GOWEN: We object.

The COURT: It may be used. Strictly speaking, it is not an article of evidence, but I see no objection to it being used as a convenient summary.

Mr. GLASGOW: Mr. Gowen and I have an agreement that we may offer such statements, either side, from the distribution sheets, as I understand it.

Mr. JOHNSON: That is so; but we are objecting on the ground of its being incompetent.

Mr. GOWEN: We might as well, at this stage of the case, have this question met that we will have to meet before we get through, and that is, whether a statement of this character affords any basis whatever for determining the issues which are involved in the case.

The COURT: It is the same question to which you referred a moment ago?

37 Mr. GOWEN: Yes.

The COURT: I do not think I am in any position to determine it just now.

Mr. GOWEN: We object to the admission of this statement on the ground that it affords no basis for the ascertainment whether the plaintiff received, during the period covered by the action, the cars to which it was entitled under a proper system of distribution; and, secondly, we object to it upon the ground that the action is brought to recover damages resulting from the failure to deliver the proper number of cars during a given period of time, and that this statement picks out and is confined to certain months within that period and consequently, for that reason, not being a statement of the entire period covered by the action, does not afford a basis for the ascertainment of the number of cars which the plaintiff should have received, if any, in addition to those which were delivered to them; and is at variance also with the case as stated in the statement of claim.

Mr. GLASGOW: In what respect is it at variance?

Mr. GOWEN: The allegation here is (on page 2): "Plaintiff avers that the said failure to so deliver to the plaintiff its proper daily allotment of cars was continued throughout the years from the beginning of 1900 to the close of 1905, as above set forth"; and in the paragraph above that, "plaintiff avers that for a period beginning January 1st, 1900, and ending the last day of December, 1905, the Pennsylvania Railroad Company did," and so on, alleging that, during that period, they failed to deliver the cars to which plaintiff was entitled. The purpose, of course, of confining the statement to certain months is to enable the plaintiff to recover in this

38 action during a period of time when it received less, as it claims—although we do not concede that—than the number of cars to which they were entitled, and to deprive us from the benefit resulting from the over-supply of cars to the plaintiff dur-

ing the other months of the period; and, lastly, with reference to this statement, we do not wish to be understood, by confining our objections to the two points I have mentioned, to admit that the statement is a correct compilation from our distribution sheets, because that we do not concede.

The COURT: That third objection, of course, is one I ought to pass on immediately. If you do not concede its correctness, it is a matter for comparison.

Mr. GOWEN: We have submitted our statements, made up by the Audit Company of New York from the distribution sheets. They do not agree with the plaintiff's and we have not been able to reconcile the difference.

Mr. GLASGOW: The fact is, that this statement, as compared with the Audit Company's of New York, is slightly different, and on three different occasions—I do not mean to say it is Mr. Gowen's fault—but by agreement between him and myself, I have sent the man who made it up for us under the direction of Mr. Wigton, to the office of the Audit Cmpany of New York to see if that difference, which is slight in this statement, could be adjusted or reconciled. I have not been able to get it and I do not think Mr. Gowen has been able to get it, but I did not expect to be met today with any question as to the admissibility of the statement because of the slight difference between us. We have both been trying to get at
39 what the distribution sheets showed without bringing them here and figuring them out. The difference is very slight, as I understand it.

The COURT: What is the difference?

Mr. GLASGOW: I cannot tell, sir.

By Mr. GLASGOW:

Q. Do you know what it is?

A. I think it is in the neighborhood of 170 cars a month, in two or three instances.

Q. As to the total cars in the region?

A. As to the total cars in the region.

Q. Of which you were entitled to 4.1 or 4.2 per cent., so it means probably five or six cars a month, something like that?

A. Yes.

Mr. JOHNSON: He has, of course, the right to put his own compilation in, as a compilation, and we are going to put our compilation in. It does not throw it out on that ground. It is on other grounds we are opposing it.

The COURT: Then, if the third objection is out of the way, I will defer ruling on the objection until later in the case.

Mr. GLASGOW: May I draw your Honor's attention to one statement of Mr. Gowen's which might mislead you hereafter, unless it is corrected now—not that I want to say anything in rebuttal of it now, but simply that your honor may not be misled. The allegation in the claim is that the distribution was on daily allotment, not on periods of years, as Mr. Gowen seems to think. It was on daily allotment, and this statement is a compilation of the daily allotments.

Mr. Gowan has some proposition which he submits to your Honor, offsetting the days that he did not give us cars by the days
40 that he did; but we want your Honor to know that our view is that this is based on daily allotments.

By Mr. GLASGOW:

Q. There was a daily allotment of cars in the Clearfield region, was there not?

A. There was a daily distribution of the cars that came into the region.

Q. And a daily sheet kept?

A. There was.

Q. And this statement which I have offered is a compilation of the total excesses or shortages on the percentage of the daily distributions?

A. It is.

Q. For each month?

A. For each month.

Mr. GLASGOW: I offer this statement in evidence.

The COURT: As I understand, that percentage applies to each day?

Mr. GLASGOW: Yes, sir.

The COURT: And that for each day they were entitled to four and some tenths per cent. of the cars that were that day in the region?

Mr. GLASGOW: That is correct, sir.

Mr. JOHNSON: Our objection to it is this: his statement is that between point A and point B of time, we were short a certain number of cars. Now, he is not showing what we are short in cars between point A and point B, but he has picked out certain of them and says we were short a certain number at that time and, necessarily, does not therefore show that which his statement avers, to wit, his shortage between those two points. In other words, he has omited part of the factors.

Mr. GLASGOW: If your Honor will permit me to read:
41 "Plaintiff avers that the said failure to so deliver to the plaintiff its proper daily allotment of cars was continued throughout the years beginning 1900 to the close of 1905." Now this statement does not show that it did continue from 1900 to 1905, but it shows what days the daily allotment was less than we were entitled to, and, while we may not be able to recover for every day in that period, we are certainly entitled to recover for such daily allotments as were less than we were entitled to.

The COURT: I will defer ruling on it until a later period of the case.

Mr. GLASGOW: I do not know how to get along until we know whether the paper is in.

The COURT: I have not ruled on it as yet, at all.

Mr. GLASGOW: My difficulty is this, if this paper is not admitted in evidence, then I have to go to the distribution sheets and put them in.

The COURT: You can do as you have been doing. The witness has had the sheet in his hands for some time and has been examined on it without objection.

Mr. GLASGOW: I was trying to avoid taking it up item by item.

The COURT: I know you were, but you were met by an objection. It would seem to me that it is not an essential matter for the defence to exclude this statement, considering that they have their own statements based on a different proposition. It is not a vital matter, as it seems to me, whether it goes in or does not go in at this period of the case. That is only my suggestion. After all, the Court
42 will have to decide what theory is to prevail and then it will have to be calculated, and it cannot be for a moment imagined that the jury will remember all these figures.

Mr. JOHNSON: Why can we not put it in subject to your Honor's ultimate ruling? Let us put it in under objection, reserving exception or anything else, until your Honor's final ruling on it as to its legal effect.

(Statement admitted subject to defendant's objection. Marked "Pl. Ex. A, November 16, 1909, V. G. M.")

The statement is as follows:

Summary of Cars Placed in the Classified Region by Months, Taken from the Penna. R. R. Daily Distribution Sheets.

Month.	Total cars in region.		Total wooden cars in region.	BERWIND-WHITE COAL MINING COMPANY.							THE MORRISDALE COAL COMPANY.							
				% Rating.	Received.		Total wooden.	Entitled wooden.	Excess.	Shortage.	% Rating.	Received.		Total wooden cars.	Entitled wooden.	Excess.	Shortage.	Tons.
	Steel.	Others.			Steel.	Others.						Steel.	Others.					
March, 1902	779	4577	6135	23.3	124	1235	1483	1429	54		4.2	220	21	461	257	204		
April, "	1051	4934	7036	23.3	121	1387	1629	1639		10	4.2	277	36	590	295	295		
				23.3							4.2							
May, "	1223	5730	8176	20.1	229	1416	1874	1883		9	4.8	227	79	533	346	187		
				19.4														
June, "	1191	5411	7793	19.3	282	1147	1711	1514	197		4.8	88	75	251	374		123	3075
July, "	934	5716	7584	19.3	222	1245	1689	1463	226		4.8	86	122	294	364		70	1750
Aug., "	901	6143	7945	19.3	207	1116	1530	1533		3	4.8	143	47	333	381		48	1200
				19.3							4.8							
Sept., "	600	5668	6868	18.6	121	1103	1345	1297	48		5.1	71	76	218	341		123	3075
Oct., "	695	6446	7836	18.6	125	1271	1521	1457	64		5.1	77	115	269	399		130	3250
Nov., "	917	5148	6982	18.6	132	1500	1764	1298	466		5.1	62	109	233	356		123	3075
Dec., "	1046	5246	7338	18.6	143	1442	1728	1364	364		5.1	49	121	219	374		155	3875
				18.6														
Jan., 1903	921	4996	6838	16.2	118	1337	1573	1126	447		5.1	107	124	338	348		10	250
Feb., "	1214	4006	6434	16.2	194	1245	1633	1042	591		5.1	96	175	367	328	39		
May, "	1441	4878	7760	15.0	113	1249	1475	1164	311		4.7	57	231	345	364		19	475
June, "	945	4748	6638	15.0	125	1052	1302	995	307		4.7	36	257	329	311	18		
Jan., 1904	609	4354	5572	14.3	63	871	997	796	201		3.9	54	174	282	217	65		
Jan., 1905	412	4916	5740	12.4	67	1284	1418	711	707		5.1	27	205	259	292		33	825
				12.4							5.1							
March, "	412	6198	7022	10.8	50	1817	1917	817	1100		5.5	17	493	527	371	156		
May, "	465	5307	6237	10.8	36	1007	1079	673	406		5.5	32	386	450	343	107		
June, "	402	5198	6002	10.8	47	980	1074	648	426		5.5	27	283	337	330	7		
Sept., "	1343	4551	7237	10.2	71	1080	1222	738	484		5.5	28	302	358	398		40	1000
Oct., "	1661	5101	8423	10.2	166	1250	1562	859	723		5.5	48	304	400	463		63	1575
			3969	10.2			716	406	310		5.5			195	219			
Nov., "	1942	4747	3983	13.9	146	1213	748	551	197		8.0	36	383	249	317		24	2980
																	68	
Dec., "	2026	4834	7728	13.9	122	1245	1419	1074	345		8.0	35	362	412	618		206	7210

44 Mr. JOHNSON: Therefore we can, at a future time, raise our objection and your Honor will then pass on it?

The COURT: Yes.

By Mr. GLASGOW:

Q. I hand you a statement. During the month of June, 1902, how many tons of coal would you have been able to ship from your mines in excess of what you did ship, if you had received the number of cars which you were entitled to under your percentage?

A. 3075.

Q. More than you did ship?

A. More than we did ship.

Q. Have you had a statement made up, under your direction and from your books of your company, as to the cost per ton, including the royalty, which you paid to the landowners, for the coal which you took out under the lease—have you had made up a statement for the month of June, 1902, as to what it cost you to put your coal on the cars at the tipple?

A. I have.

Q. Will you please tell the jury what that figure was for the month of June, 1902?

A. The cost of the coal produced at those mines in June, 1902, including the royalty, was 97 cents a ton.

Q. On the cars?

A. Loaded on the cars ready for shipment.

Q. Did you, during the month of June, 1902, have contracts outstanding for the delivery of coal which it was necessary for you to fill?

A. We did.

Q. What kind of people were the contracts with?

A. Steamship companies, railroads and manufacturing companies in New England.

Q. You mean steamships——

A. Sailing from the port of New York.

Q. Liners?

45 A. Liners, yes, and freighters also.

Q. Was it necessary or not for them to have that coal?

A. They must have it, to get out of the port of New York. We were obligated to make the delivery.

Q. Did you, during that month of June, 1902, have to buy coal in order to supply the lack by reason of 3075 tons?

A. We did.

Q. Have you made up a statement from your books showing what that coal cost you per ton during that month that you bought it?

A. I have.

Q. Can you tell us what that was per ton?

A. $1.93 per ton.

Q. What is the difference between that amount and what it would have cost you to put it on the cars?

A. 96 cents a ton.

Q. And that, multiplied by 3075 tons, is $2952, the amount of damage you claim for that month?

A. We do.
Q. Is that correct?
A. That is correct.
Q. For the month of July, 1902, how much coal could you have shipped if you had had your pro rata proportion of the cars, over and above what you did ship?
A. 1750 tons.
Q. And during that month, what was the cost per ton of putting the coal on the cars at the mines?
A. 91 cents.
Q. Did you buy coal to fill contracts during that month?
A. We did.
Q. In the market?
A. We did.
Q. And paid the market price therefor?
A. We did; paid the market price.
46 Q. What was the price you paid?
A. $1.33 a ton.
Q. What was the difference between the two?
A. 42 cents per ton.
Q. And that multiplied by the 1750 makes $735, the amount you claim for damages for the month of July, 1902?
A. It does.
Q. On the same basis, how much damage do you claim for the month of August?
A. $696.
Q. Then for the month of September, 1902?
A. $5166.
Q. And for the month of October, 1902?
A. $9945.
Q. That was the period, was it, of the anthracite strike?
A. That was the period of the anthracite strike, and when coal was very high.
Q. It had increased in value?
A. Very much.
Q. And you were unable to get the coal from your mines?
A. We could not get it from our mines.
Q. In November, 1902, what is your damages on the same basis?
A. $6549.75.
Q. And for the month of December, 1902?
A. $13,368.75.
Q. In November, 1902, what is your damage on the same basis?
A. $622.50.
Q. During that period the price of coal had gotten very high in the market, had it not?
A. The price of coal had gone up very, very greatly, so much so that it was almost impossible to get it. Coal was brought from Great Britain.
47 Q. Were the people with whom you had the contracts holding you to them?
A. They were; demanding the fulfilment of them.
Q. Demanding the fulfilment of the contracts?

A. They were.

Q. Is it a fact that, during that period, there was a large amount of coal which you were not able to deliver and for which you had to pay damages?

A. We did.

Q. In addition to this amount?

A. In addition to this, yes.

(Adjourned until Wednesday, November 17, 1909, at 10 o'clock a. m.)

PHILADELPHIA, PA., WEDNESDAY,
November 17, 1909—10 a. m.

Present: Parties as before noted.

FRANK H. WIGTON, recalled.

By Mr. GLASGOW:

Q. In the statement which you have in your hand, which is your claim for damages in this case, during the month of June, 1902, you stated yesterday that the cost per ton to put coal on the cars at the Morrisdale mines amounted to ninety-seven cents a ton, including the royalty to the landowner?

A. It did.

Q. Explain to the jury what you mean by the royalty to the landowner?

A. The royalty is the amount paid to the landowner, based on a certain amount per ton, on coal that is taken from the mine—that is, rental or royalty.

Q. You are the lessee of the land out of which you take the coal?

A. Yes, we were.

48 Q. That is the amount per ton that you have to pay to the landowner?

A. That is correct.

Q. And during that same month, you charge that the cost of the coal you bought, 3075 tons, in order to supply the coal—to fill your requirements during that month, was $1.93 per ton?

A. Yes.

Q. A difference of ninety-six cents?

A. Yes.

Q. $1.93, is that the average price of the coal which you used to take up that 3075 tons during that month?

A. It is the average price.

Q. Can you state whether or not the market price of coal during that month of June, 1902, was as high, or not as high, as the highest amount you took in making the average?

A. It was fully as high. All that coal was bought either by myself, or under my instruction or supervision, and very naturally I was not paying any more for coal than I could avoid. I bought the coal at the lowest possible market price.

Q. You had some coal for delivery to you, during that month, and which you paid for during that month, which was less than the

price of the market price of coal during that month, and which coal you applied to this deficit?

A. That is true, because I had made some arrangements for coal prior to the month of June to be shipped and delivered in the following months of the year, and that price, owing to market conditions before June, was lower than the price that ruled in the market after June, but in making the average, that was given in there to reduce the general average.

Q. And, therefore, as I understand you, during the month of June, you gave to the defendant the benefit of such coal as
49 you got and paid for during that month, which was less than the market price during that month, and which coal you applied to this deficit of 3075 tons?

A. We did; because it seemed the only fair way was to take the average of all coal purchased during the month, to reach the average cost.

Q. In making up the statement that you have in your hand, is that the way that you made up the statement for the months mentioned thereon in 1902, 1903 and 1905?

A. Yes, the same way.

Q. As I understood you yesterday, there were periods during that complete period from 1902 to 1905 when you got more cars than the percentage which was awarded to you, would have entitled you to?

A. Yes.

Q. Can you explain how that would happen—how it would happen you would get more cars?

A. The excess in the car supply is shown upon the sheet which is compiled from the Pennsylvania Railroad records, which they furnished us, and the excess car supply undoubtedly happened because at certain periods other operators in that district either could not use the cars or did not want them, and therefore the railroad company had sufficient cars to meet the askings of those who did need them, and as we were constantly asking for more cars than our percentage, they put them up there to be loaded, and we loaded them and sent them out.

Q. When, in the region, certain operators do not need the cars which they are entitled to under their percentage, the rule is, that the railroad company distributes those cars to the people who can load them in addition to the percentage they are entitled to, is it?

A. Yes. The railroad company will give the operator asking for more, any number that he wants, if they have them, after the other people are supplied.

50 Q. And if a man can load cars, the railroad company gives him the cars that the other people do not load or cannot load, or do not want to load, in addition to what he is entitled to under his percentage?

A. They do.

Q. During the period you got the excess of cars, was the market price of coal as high or lower than at the time when you were short of your percentage of cars?

A. Very much lower, because the market is affected—it is an evidence of it being affected when the cars become scarce.

Q. Then this statement, amounting to $43,290.45, which you have told the jury how it was made up—is that a correct statement from your books?

A. That is correct, as taken from our books.

Q. Does the amount of tonnage which you may raise and ship from the mine affect in any way the cost of the amount that is mined?

A. Very materially.

Q. In what way?

A. If a mine is equipped to produce 1,000 tons a day, with all the necessary appliances and the necessary men, who are paid monthly wages, then, if you produce 1,000 tons per day, you have mined your coal under the basis of estimated cost, which would be the minimum cost of production. But if your output is limited, and reduced to 500 tons per day, all the dead work, or fixed charges, must be divided by the 500 tons, in place of being 1,000, and that makes a very decided increase in cost, or making up the difference between profit and loss.

Q. There are fixed charges which must be paid, no matter whether the tonnage is 100 tons or 500 tons?

A. There are.

Q. And if you distribute the expense over a larger tonnage, it necessarily reduces the cost per ton. Is that right?

A. It does, yes.

51 Q. Have you figured out an estimate, or so far as you can do so, accurately, what your loss per ton upon the entire tonnage which you would have been able to ship, if the railroad company had furnished the cars you were entitled to—what amount per ton the additional tonnage would have decreased the cost to you?

A. I have. I have taken the amount of coal produced on the cars furnished, and therefore that amount shipped, and considered the amount of coal which would have been shipped in addition to that, had the proper proportion of cars been furnished. Putting the two together, the difference in cost, under the method of working which was enforced upon us, would be equivalent to a minimum of five cents per ton, which amounts to something like eighty-three hundred dollars. The reason for that is, that in the coal which was produced, all the dead work charges are included, and the coal which would have been produced had the other cars been furnished, would not have cost the average which the sheets show the coal did cost, because there would have been no charge to add to that amount of tonnage, except what we know as miners' wages, the digging of coal, the hauling of the coal, and loading it on the railroad cars. All the other charges remained the same, and they were included in the amount of coal which was purchased and shipped, and therefore that cost was enhanced to the extent of something like $8300, five cents per ton.

Q. Is that estimate of five cents per ton a fair one?

A. I should say it was a very conservative estimate.

Q. Indicate some illustration of what the fixed charges that you speak of are, what department of the work, no matter what amount of coal you may raise?

A. You take the Morrisdale shaft No. 2, which is covered in this.
52 The pumps have to be run constantly, seven days in the week and twenty-four hours in the day. It takes about 1,000 tons a month to run those pumps, whether you are working or whether you are standing. That coal costs us about $1,000 to produce and burn right there. Then the men in charge of the pumps must be at work whether you are standing or whether you are running, the engineers, the firemen, the superintendents, your mules, and your machinery has to be kept up, whether it is in use or idleness and your mules have to be fed, whether they are standing in the barn or whether they are at work. It costs just as much to feed them when they are idle as it does when they are at work, and those are what we call items of fixed expense, or fixed charges.

Q. Those are the illustrations that you mean by that?

A. Yes.

Q. That makes the total of your damage during the months covered by this statement of $51,640.60?

A. Yes, it does.

Q. Then on the next page is a calculation of the interest on each of those sums from the time of the breach by the defendant company. Is that correct?

A. It is.

Q. Making a total of $69,256.09?

A. That is correct.

Mr. GLASGOW: We offer that statement in evidence.

Mr. GOWEN: I suppose your Honor will prefer to allow this to go in subject to the objection?

The COURT: Yes, of course.

Mr. GOWEN: As to whether this affords any basis?

The COURT: It is a synopsis, and its accuracy is substantial. I suppose it may be used for the same purpose as the books would be used if the books were here.

53 The statement is as follows:

The Morrisdale Coal Co.

PHILADELPHIA, *Nov.* 16, 1909.

The Pennsylvania Railroad Co. to The Morrisdale Coal Co., Dr.

Claim for loss by reason of not receiving sufficient cars as ordered, based upon our percentage of cars placed in the Clearfield Region:

1902.							
June.....	3075	tons as per statement			1.93		
					.97	.96	2952.00
July.....	1750	"	"	"	1.33		
					.91	.42	735.00
August.....	1200	"	"	"	1.54		
					.96	.58	696.00
September....	3075	"	"	"	2.75		
					1.05	1.68	5166.00
October.....	3250	"	"	"	4.13		
					1.07	3.06	9945.00
November.....	3075	"	"	"	3.21		
					1.08	2.13	6549.75
December.....	3875	"	"	"	4.49		
					1.04	3.45	13368.75
1903.							
January.....	250	"	"	"	3.63		
					1.14	2.49	622.50
May.....	475	"	"	"	1.29		
					1.14	.15	71.25
1905.							
January.....	825	"	"	"	1.07		
					1.19		
September.....	1000	"	"	"	1.13		
					1.08	.05	50.00
October.....	1575	"	"	"	1.13		
					1.07	.06	94.50
November.....	2980	"	"	"	1.28		
					1.01	.27	804.60
December.....	7210	"	"	"	1.41		
					1.10	.31	2235.10
							43290.45

1902.										
June	6,366	Tons	shipped	from	Morrisdale,	Mabel	&	Madeira	Mines	
July	7,958	"	"	"	"	"	"	"	"	
August	8,508	"	"	"	"	"	"	"	"	
September	5,367	"	"	"	"	"	"	"	"	
October	6,374	"	"	"	"	"	"	"	"	
November	5,909	"	"	"	"	"	"	"	"	
December	5,852	"	"	"	"	"	"	"	"	
1903.										
January	8,981	"	"	"	"	"	"	"	"	
May	11,149	"	"	"	"	"	"	"	"	
1905.										
January	9,047	"	"	"	"	"	"	"	"	
September	11,835	"	"	"	"	"	"	"	"	
October	14,703	"	"	"	"	"	"	"	"	
November	16,069	"	"	"	"	"	"	"	"	
December	15,270	"	"	"	"	"	"	"	"	
	167,003	Tons at 5c.								8,350.15
										51,640.60

To interest from	July	1,	1902,	to	November	16,	1909,	on	2,952.	1,306.26
" " "	Aug.	1,	1902,	"	"	"	"	"	735.	321.56
" " "	Sept.	1,	1902,	"	"	"	"	"	696.	301.02
" " "	Oct.	1,	1902,	"	"	"	"	"	5,166.	2,208.46
" " "	Nov.	1,	1902,	"	"	"	"	"	9,945.	4,201.76
" " "	Dec.	1,	1902,	"	"	"	"	"	6,549.75	2,734.51
" " "	Jan.	1,	1903,	"	"	"	"	"	13,368.75	5,514.61
" " "	Feb.	1,	1903,	"	"	"	"	"	622.50	253.66
" " "	June	1,	1903,	"	"	"	"	"	71.25	27.61
" " "	Feb.	1,	1905,	"	"	"	"	"	.....	.....
" " "	Oct.	1,	1905,	"	"	"	"	"	50.	12.37
" " "	Nov.	1,	1905,	"	"	"	"	"	94.50	22.92
" " "	Dec.	1,	1905,	"	"	"	"	"	804.60	191.09
" " "	Jan.	1,	1906,	"	"	"	"	"	2,235.10	519.66
										$69,256.09
									Credit by error	2,100.00
										$67,156.09"

55 By Mr. GLASGOW:

Q. You had contracts, as I understood you yesterday, which required the delivery of coal during each month during this time?

A. We did, contracts for delivery in the port of New York, and places in New York City and New England, which were the ones that were principally covered by this shipment.

Q. In those contracts was it necessary to have daily deliveries of coal to comply with the requirements?

A. Daily, weekly and monthly. Some required so much per day, some so much per week, and some so much per month.

Q. What I mean is, was it necessary, in your business, that there should be a regular daily supply of cars?

A. It is necessary—absolutely essential for the conduct of such business.

Cross-examination.

By Mr. GOWEN:

Q. Will you please state again, for I do not recall, as I have not the notes of testimony before me, which of your mines were shipped over the Pennsylvania Railroad?

A. What we know as Morrisdale No. 2 shaft, Mabel, and during a portion of this time the Madeira. We had also mines in another district, known as the Broad Top mines.

Q. And in your direct examination you stated, as I recall it, that the shipments from the mines which you have just mentioned, were made exclusively over the Pennsylvania Railroad?

A. The shipments from those mines were made exclusively over the Pennsylvania Railroad.

Q. You recall testifying, do you not, before the Inter-
56 state Commerce Commission two or three years ago, in connection with an investigation which was conducted into the method of conducting the coal trade—the coal business of the Pennsylvania Railroad?

A. Yes, I remember the circumstances.

Q. Let me read you from the notes of testimony that you gave there, and say whether, in view of what you then stated, that you are correct in what you stated here:

"Furthermore, quite a good deal of coal mined at the Morrisdale No. 2 is transported under ground, by reason of lack of car supply of the Pennsylvania Railroad, and lifted at No. 2 and shipped over the New York Central, and, although No. 2 might be reported as working today, it would not necessarily be shipping coal over the Pennsylvania Railroad."

A. Possibly I did.

Q. That is a correct statement?

A. Possibly. It is fair that I should explain that thing. The Morrisdale property consists in all of some 5,000 acres. The New York Central Railroad approached it on one side, and there are two shafts or openings on that. No. 1 shaft is about a mile away from No. 2 shaft, which is located on the Pennsylvania Railroad. There is no

connection with the New York Central Railroad from No. 2 shaft at all. The coal that is produced in the other property underground, in mining, is taken out of these three openings, one on the Pennsylvania, and No. 2—two openings on the other, the Pennsylvania Railroad Company giving us a rating for what is known as No. 2 shaft, which mines the other section of that property, and while it is possible that coal might be hauled from that same territory a mile and loaded on the New York Central tracks, it is done at increased cost, and is only done for the purpose of reducing the expense during a time of idleness, and if No. 2 shaft was
57 working, and digging coal at a time when the Pennsylvania Railroad Company did not furnish a sufficient number of cars, the result of that is to reduce the general cost of what coal was produced at No. 2 shaft, and thereby giving the Pennsylvania Railroad Company on this account the advantage of that condition, because if it had not been working, the expense by reason of the idleness would have increased that cost. It is true that the coal may have been taken across and loaded at the other, and worked in that way.

Q. Is it not true that the coal was taken across?

A. Yes.

Q. Frequently?

A. How frequently I do not know.

Q. But quite frequently?

A. When the Pennsylvania Railroad Company did not furnish the cars, we would do it, whenever we had the facilities to take it.

Q. When the Pennsylvania Railroad Company was not furnishing cars, you took that coal from No. 2, underground, through No. 1, and raised it out of No. 1, and shipped it by the New York Central?

A. A portion of it. Not all of it. A portion of it.

Q. Will you tell us what it amounts to in tons?

A. I could not say the number of tons, because it would depend upon the conditions under ground surrounding the No. 2 shaft.

Q. In the testimony which you gave before the Interstate Commerce Commission, to which I have just been referring, did not you testify to this effect This testimony was given in May, 1906, was it not?

A. I do not recall the time.

Q. About that time. Referring to the condition of affairs existing in the Clearfield region, in which your mines are located, did not you testify as follows:

"After much pressure upon the Pennsylvania Railroad Company they once or twice issued orders to give us ten cars a day,
58 which was kept up at intermittent periods for a month at a time, possibly, and finally was rescinded entirely. That condition of affairs has been going on the past three or four years and because of it, particularly in the Clearfield region, is due to the fact that, first, is taken into that district cars for their supply coal, which are not counted in the distribution; second, individual cars for certain operators, which fully meet the requirements of those operators in that district, and they are not counted in the distribution, or at

least they were not prior to the first of this year; third, they accept cars from foreign railroads such as the Delaware & Hudson, the Boston & Maine, the Lehigh Valley and the Philadelphia & Reading, and they were placed in that region and not counted in the distribution. So, by the time all those cars were in the region, they had facilities enough to take in for distribution about fifty cars a day, and those were divided around supposedly on the percentage basis, which gave us some three or four cars a day."

Do you recall that testimony?

A. In the main, I have no doubt that is correct.

Q. You have no doubt that that was a correct description of the conditions existing in the Clearfield region during the three or four years?

A. As I have described it, to the best of my knowledge, at that time.

Q. Preceding your giving of this testimony.

A. Yes, sir.

Q. What were those foreign cars you were referring to—the Delaware & Hudson, the Philadelphia & Reading, the Lehigh Valley and others—what were they sent in for?

A. Sent in for coal.

Q. Were they not sent in for the supply of coal to those railroad companies?

A. That I do not know.

Q. You know that is largely true, do you not

59 A. From rumor and hearsay, yes. From my knowledge, no, sir.

Q. From your knowledge of the conditions prevailing in the Clearfield region, don't you know that these foreign railroad cars which got into the Clearfield region were mainly, if not wholly, sent there for the supply of coal of the railroad owning the cars?

A. Answering that question from the same source, knowledge which is current report and general information of the trade, there were a great many Boston & Maine Railroad cars sent into the Clearfield region, ostensibly for the supply of coal of the Boston & Maine Railroad, but a large portion of them were used for commercial purposes by one coal man, who seemed to control the supply of the Boston & Maine Railroad cars, that were sent into the Tyrone and Clearfield region.

Q. You have spoken of the Boston & Maine. How about the Delaware & Hudson River, the Lehigh Valley and the Philadelphia & Reading?

A. The same party seemed to have entire control of the Delaware & Hudson cars.

By Mr. GLASGOW:

Q. What party is that that you are speaking of?

A. J. J. Childs Coal Company, Lansenburg, New York. It was understood that they were so closely allied with the Delaware & Hudson people that they had a very good reason for having control of those cars.

Q. Those cars were received by the Pennsylvania Railroad Company, consigned to certain mines to be loaded, apparently, with a supply of coal for those companies, were they not?

A. I always understood so.

Q. That was true also of the Philadelphia & Reading and the Lehigh Valley cars?

A. No, sir; it was currently reported that the Philadelphia
60 & Reading cars that were placed on the Pennsylvania Railroad were controlled by one coal operator, and although they were placed there for the purpose of the Philadelphia & Reading supply of coal exclusively, they were largely used for commercial purposes on the Reading road. I am only giving it to you as it is generally understood or was understood in the coal trade. As to its correctness I do not know.

Q. But they were received by the Pennsylvania Railroad Company, consigned to certain mines, to be loaded with a supply of coal, and if they were used as you say they were after they got on the Philadelphia & Reading tracks, that was something that the Pennsylvania Railroad Company could not control?

A. Very likely not.

Q. In the statement which you have prepared, which purports to show a number of cars for distribution in the region—in the Clearfield region, and the number of cars received by you during certain months, you have included both the cars of the Pennsylvania Railroad Company, the individual cars or private cars of operators in the Clearfield region, and these foreign railroad cars?

A. We have included all the cars that were placed.

Q. Did I understand you yesterday to say that you had been satisfied yourself as to the accuracy of that statement?

A. I have checked over a large number of those daily reports of the Pennsylvania Railroad Company, in the Pennsylvania Railroad Company's offices with the man who actually made the first compilation.

Q. But you did not, of course, undertake to check every date?

A. Not every one, no. I am not positive even now whether I did not go through the fifteen months that is covered by this, and that was brought about by the Pennsylvania Railroad Company presenting a statement made by the Audit Company of New York,
which showed a difference, which, in the aggregate, was not
61 large, amounting to some 180 cars in the month, and in an effort to find out where that was, and detect the discrepancy, I called on the man who did the work for us, and checked over probably all of the months covered by this—at least, a great many of them, and found them to be correct.

Q. That statement you had prepared covered the entire period from March, 1902, to the end of 1905, did it not?

A. No. I am speaking now from memory. I think it did not take in 1904, upon which year we have no claim.

Q. But it took in all the months except January and February, 1902.

A. You are referring now——

Q. I am not referring to the statement you produced in court, but the statement you had prepared by the man who you delegated to make up the statement from our distribution sheets?

A. I think it takes in all of that time.

Q. Every month?

A. Yes.

Q. From March, 1902, to the end of the year 1905?

A. I cannot speak for 1904. The records are here to show for themselves.

Q. And in the statement which you have submitted here, and from which you have been testifying, you have excluded the months of March and April, 1903, and July and August——

A. 1903.

Q. Yes.

A. Yes.

Q. March and April, 1903, July, August, September, October, November and December, 1903?

A. Yes.

Q. And all of 1904 except the month of January?

A. Yes.

62 Q. And the months of February, April, July and August of 1905?

A. That is right.

Q. Those were excluded, because in all those months you had cars in excess of the percentage you were entitled to?

A. Yes; in some quite a large excess and in others just a little, a trifle, but always an excess.

Q. You stated, as I understood you, in answer to a question of Mr. Glasgow, that the excess of cars which you got in those months was due to the fact that other operators in the Clearfield region got all they wanted, and the excess cars delivered to you were cars which the railroad company could not place elsewhere. You did not mean to say that, did you?

A. Not quite as you have placed it.

Q. I may have misunderstood you.

A. If you will allow me to repeat. My understanding of the reason why the Pennsylvania Railroad Company would give us this excess number of cars during this period of time, was, that either other operators were fully supplied, or did not want them. I knew of no other reason why we would get any excess of cars in that period of time for those reasons. If there were any other reasons, they were unknown to me.

Q. You do not know anything about the demand of other operators, as to whether they had all the cars they wanted?

A. I only know that in the general working of the business, if the Pennsylvania Railroad Company gave an excess in cars, it was because they had them to give, and because others had received all they wanted. I do not know of any other cause for it.

Q. You do not suppose it was due to the fact that in one month you might have gotten a deficiency, and that deficiency was made up to you in the next month?

A. No, I do not.

Q. Do you not think that is reasonable?

63 A. No, I do not think it is reasonable, because the making up of what occurred last month in shortage would not make up the trouble that arose, the loss that arose. They may have been doing that, but it is not known to me.

Q. Will you be kind enough to mention any operators whom you know of, who, during the months that you received this excess in cars, had all the cars they wanted?

A. I could not mention any operators, for I do not know them. I am only speaking of my general knowledge of the working of the coal business.

Q. Is what you have stated anything more than an inference on your part, based solely upon the fact that in these months you did get more cars than your percentage?

A. It is only an inference on my part that we had cars placed wherever somebody did not load them, in excess of other requirements.

Q. You do not think the excess of cars was at all to be ascribed, to what I have already read to you, as to what you stated before the commissioner, that "After much pressure upon the Pennsylvania Railroad Company, they once or twice issued orders to give us ten cars a day." Was not that an arbitrary allotment of cars to your mines in excess of your percentage?

A. Prior to June, 1902—I think it was in 1901—probably in 1900—after repeated interviews with the officials of the Pennsylvania Railroad Company, in which our position was shown to be very peculiar, and in which the officials of the Pennsylvania Railroad Company replied to me repeatedly, "Your position is unique; we know you are suffering; we would like to do something to assist you, but how can we do it?" In 1901, I think it was, or probably the early part of 1902, acting under the instructions of the vice-president of the Pennsylvania Railroad Company, some ten cars a day were given to us arbitrarily. They would come for a

64 few days, then they would stop. I repeatedly said to the vice-president, and also to the general manager, or superintendent—the manager of transportation—"This is doing business under favors. I never know where I stand. I come down tomorrow with cars, and the next morning they are gone. I do not want to do it that way. We are entitled to our percentage of what goes in there, and we must suffer if you cannot spare the cars, but we are certainly entitled to our proportion of all the cars that go into that district, and while it is very nice to have these ten steel cars every day, you can see that there is constant uncertainty there; you cut them off any day at all, if you want to do so, and I would rather you did not do it, but give us what I am entitled to have. Under your basis of distribution, it will require about 1,000 cars a day to be placed there. Give us our percentage to run our collieries full. You know you never did place them, and you could not place them, and you will admit to me that you could not haul them if you did place them." All of it was admitted by the officials of the Penn-

sylvania Railroad Company. Subsequent to about June I have no recollection of having received any special assignment of cars at all. If there were, it is out of my recollection.

By Mr. GLASGOW:

Q. What year was that? Subsequent to June of what year?
A. 1902.

By Mr. GOWEN:

Q. Do not you recall that similar instructions were issued in January, 1905, and that for some months following that you got an arbitrary allotment of cars?

A. No, I do not decall that. If the records would show it, it may have been. I cannot recall anything of that kind.

65 Q. When did your company become the owner of individual cars?

A. I think it was in January or February, 1903, and the way those individual cars came to be placed——

Q. You became the owner of individual cars in the early part of 1903?

A. I think that time, or thereabouts.

Q. Did not you farm out those individual cars to other mines than your own?

A. We did place some individual cars at other collieries from which we bought coal.

Q. That practice continued all through the years 1904 and 1905, did it not?

A. I cannot say how long it continued, but we did do it. I do not know just how long it was.

Q. How many individual cars were there?

A. 150.

Q. What were they, wooden or steel cars?

A. Wooden cars.

Q. Would you be surprised if in those years 1100 of those cars were placed at other mines than your own?

A. Not necessarily. In what years? 1903 and 1904?

Q. Yes.

A. We have no reference to 1904 in this matter at all, and 1100 cars would ordinarily be those cars that were making two trips and a half a month.

Q. But they do not?

A. And that would be equivalent to about three months' running. I would not be surprised if in 1903 and 1904, especially in 1904, when we were out on strike, for four or five months by reason of differences between the miners and ourselves, when this number 2 shaft was shut down, we were buying coal elsewhere and running our own cars to secure the coal.

66 Q. But the placing of these cars at other mines was not confined to the strike period? The placing of your cars at other than your own mines was not confined to the period of the strike? It extended through the years 1903 and 1904. Did it not?

A. I do not know just over what period of time?
Q. Can not you tell from some records?
A. We could probably from looking up the records, yes.
Q. Suppose you do that and let us have that statement?
A. Sure, I will have it looked up for you.

By Mr. GLASGOW:

Q. What record have you of that?
A. The only record that we have of that would be the shipments of coal that were purchased, and it might show our individual cars were placed with those people, and they used them. I am not sure that our records will show that, but we will do our best to look it up and find out about it.

By Mr. GOWEN:

Q. Describe very briefly, so that the jury may understand, the method pursued by the railroad company of actually making the distribution of cars at the various mines throughout the region, how often in each day is that distribution generally made—how frequently each day is the distribution generally made?
A. The distribution ordinarily is made once a day, in the morning, although they sometimes, I believe, ran trains to us in the afternoon. Usually it is once a day.
Q. And under the practice which prevails up there, you are obliged to regulate the output of each mine daily for the number of cars which are placed for loading?
A. Whatever number of cars are placed for loading restricts the output, and a difficulty sometimes arises that the railroad company places cars for us in the morning at eight or nine o'clock,
67 and sometimes it is afternoon, and if there are no cars left over from the placing of the day before, to start to work at seven o'clock in the morning, you can't ask a crew of men to remain in idleness waiting for cars that may not be placed until later in the day, and their irregular hour of placing cars sometimes results in a day's idleness that might not have arisen had they placed them more regularly, but the usual method is to come as early in the morning as they can.
Q. Are you correct in stating that 98 or 99 per cent. of your business during the period covered by this action was interstate business—that is, shipment to points outside the State? Was it as great as that?
A. I should think that, because our business within the State of Pennsylvania is practically nothing; very small.
Q. That is a very different condition from that which prevails in the Clearfield region generally, is it not?
A. That I do not know, as to where other people may be placing.
Q. But from your general knowledge, is it not a fact that probably from one-fourth to one-third of the shipments originating in the Clearfield district go to points in the State?
A. No. I would not like to speak with any degree of definiteness as to the quantity. I do not know. I only know as to ourselves.

Q. It must be a substantial proportion?
A. I should think so, but I do not know the quantity.
Q. In the statement which you read from yesterday, you embraced not only the cars placed in the Tyrone region as a whole and the cars which had been delivered to your mines, but you also included the cars which had been delivered at the Berwind-White Coal Mining Company's mines, did you not?
68 A. All cars delivered at all mines in the Clearfield region, as taken from the sheets.
Q. You also singled out the Berwind-White Company's mines for especial consideration?
Mr. GLASGOW: For comparison.
The WITNESS: We did it only for comparison. That is all.

By Mr. GOWEN:

Q. When the figures were presented to you by your accountant, who took them from our distribution sheets, which showed the number of cars delivered at the Berwind-White Coal Company's mines, those figures showed you, did they not, the number of fuel cars which had been placed at those mines, the number of Berwind-White Company's own individual or private cars, and the number of the Pennsylvania Railroad system cars?
A. The Pennsylvania Railroad sheets showed the specific kind of cars as placed. In making up our sheet we put everything together.
Q. You are not in a position to say, as I understand, what proportion of the cars delivered to the Berwind-White Company's mines was fuel cars from the Pennsylvania Railroad's own supply, and the individual cars of the Berwind-White Company?
A. No, I could not say, without reexamining those daily reports of the railroad company.
Mr. GLASGOW: I do not know whether they show that.
The WITNESS: I think they do.

By Mr. GOWEN:

Q. You know the method of purchasing fuel coal which has been in force for a number of years on the Pennsylvania Railroad Company's lines? I mean by that, you know the coal is bought from the operator at the mines. That is the fact, is it not?
69 A. Yes, sir; I so understand it.
Q. The Pennsylvania Railroad Company fixes a region price, and that price is paid for the coal delivered in cars at the mines, the Pennsylvania Railroad furnishing the cars?
A. I so understand.
Q. Coming to the question of the coal which you state you had to purchase in order to enable you to fill the contracts which you had entered into, which could have been supplied, in whole or in part, I suppose your contention is, from the coal that you could have shipped from these mines, had you had the cars. Commencing with the month of June, 1902, you have stated that you purchased in that month 3,075 tons?
A. Yes, sir.

Q. And your claim is that you are entitled to hold us liable for the difference between the cost which you would have incurred had you produced that coal, and the cost that you were put to in purchasing it?

A. That is correct.

Q. That 3075 tons was only a small part of your total coal purchased for that month, was it not?

A. That is possible. No, it is not a small part. It is a part, but whether it covers the total purchase—I do not think it does.

Q. It appears, unless I have misunderstood the books, that I was in error in assuming that in the month of June you purchased more than 3075 tons. What does this book show your purchases during that month were of coal?

A. This book would show that the total purchases as shown from other people were 2063 tons, but there was coal taken from other mines on the New York Central Railroad *Company* to fill up the deficit which arose through the lack of car supply here.

Q. Coal mined at your own mines?

A. Yes, sir; robbed Peter to pay Paul.

Q. Then in point of fact, although, in this statement you
70 have submitted, you have sought to charge us with the price of 3075 tons purchased as you say at the average price of $1.93, in point of fact your entire purchases during that month amounted to only 2063 tons?

A. Our purchases from outside parties, but we were deprived from selling coal which came from other mines on another railroad.

Q. The Morrisdale Coal Company cannot purchase from itself coal which it mined itself, can it?

A. In one sense, yes. It can be estopped from selling coal at a profit if it is obliged to fill it somewhere else, through a lack of someone supplying the cars.

Q. In the month of July, 1902, this book shows purchases of 5116 tons, and you seek to charge us with the cost to which you were put in purchasing 1750 tons?

A. Yes, sir.

Q. Of that 5116?

A. Yes, sir.

Q. Why was it necessary for you to purchase so much as 5116, when, according to your own claim, you were only deprived of shipping 1750 tons?

A. Our purchase of the excess above 1750 tons was in the ordinary course of business and had nothing to do with the Pennsylvania Railroad Company being short in their car supply to us to the extent of 1750 tons.

Q. In other words, you bought the coal for the purpose of reselling it at a profit?

A. Either that, or putting it in our bins—yes, reselling it at a profit.

Q. This book shows that through the balance of the year 1902 your purchases of coal in each month, compared with the amount

which you claim you were unable to ship from your own mines due to shortage of cars, were as follows:

71 August, purchased, 8107.
Shortage claimed, 1200.

A. If that shortage is correct.
Q. September, 7596. Shortage claimed, 3075?
A. Yes.
Q. October, purchased 12,340 tons?
A. Yes.
Q. Shortage claimed, 3250 tons?
A. Yes.
Q. November, 10,357 tons purchased?
A. Yes.
Q. Shortage claimed, 3075?
A. Yes.
Q. December, 13,955 tons purchased?
A. Yes.
Q. Shortage claimed, 3875 tons?
A. Yes.
Q. May we conclude that what you have said as to July and August purchases applied equally to purchases throughout the balance of the year?
A. Yes; that is correct.
Q. In other words, all this coal was purchased to be resold?
A. No, all of this coal was purchased—a portion of it to fill contracts that we were obligated upon, and I suppose any surplus, if there was any, was to be sold again at a profit.
Q. In November, 1905, you charge us in this statement which you have prepared, with the cost of purchasing 2980 tons at $1.28 a ton. Is that right?
A. You have the record. I have not it here. 2980 tons, but the price per ton I have not.
Mr. GLASGOW: It is underneath here, I think.
The WITNESS: November, 1905, $1.28. That is right. I did not know I had it on the statement here. This is summarized here. I did not know I had it.

72 By Mr. GOWEN:

Q. How much coal did you purchase actually in that month?
A. November?
Q. Yes.
A. 1335 tons from outside parties, and it took the balance to fill our obligations from mines on other railroads.
Q. In December, 1905, you charge us with the cost of purchasing 7210 tons at $1.41?
A. Yes.
Q. How much coal did you purchase in December, 1905?
A. 2714 tons from outside parties, and it took the balance to fill our obligations away from other trade on other railroads.
Q. You took the balance in both months from coal mined at the Morrisdale mines?

A. Not all Morrisdale. From other places.

Q. The coal mined by the Morrisdale Coal Company?

A. Yes, sir.

Q. You have spoken of contracts which you were under obligation to fill during this period. What contracts were those?

A. Such contracts as steamships——

Q. I do not mean the character of the contracts. With what parties had you contracted to furnish coal, who you were obliged to make deliveries to during this period

A. The Clyde Steamship Company, the Phœnix Line, and a subordinate company of the United Gas Improvement Company, delivered in Connecticut, and very many foreign owners. We had contracts to the extent of probably one hundred to one hundred and thirty, and other mines that for the moment I cannot recall—steamship people.

73 Q. Is it not a fact that you sold during this period at high prices a very large part of your output, at those high prices?

A. No, sir. It is a fact that the Morrisdale Coal Company at the termination of their year, after going through a period of excessively high prices in the anthracite strike, showed a very heavy loss of money, not having made one cent out of the increased prices.

Q. Do you mean to say you sold no coal at the high prices prevailing, and you delivered all the coal which you mined—which the Morrisdale Coal Company mined, during this period of high prices, under contracts to persons to whom you had contracted to make deliveries at low prices?

A. In effect, yes. All the coal that was sold by the Morrisdale Coal Company during that period of time was what was purchased and turned over, and sold in that way. They may have sold some other coal, although I doubt it, from other mines on other railroads during that time.

Mr. GOWEN: Mr. Glasgow, I asked you to have the books of the Morrisdale Coal Company here to cover the sales of coal, this morning.

Mr. GLASGOW: I must have misunderstood you.

By Mr. GLASGOW:

Q. Have you books here showing the sales of coal made by you during that period?

A. We have the books here, I suppose, showing the coal that was invoiced to the various people during this time.

Q. Have you any other books?

A. I do not know whether they are in the court room or not. We do have such a book that will show the invoices monthly to every consignee.

By Mr. GOWEN:

Q. And the prices realized?

A. At the prices we received for it.

74 Q. I wish you would just state what it was that caused the abnormally high prices for the Winter,—during the Fall

and Winter of 1902 and 1903, when coal commanded such a high price?

A. I could only answer that question from my personal view of the situation.

Q. You know yourself?

A. Yes; pretty well.

Q. It was the anthracite strike?

A. No, it was not, I beg to differ with a great many. The cause of the excessively high prices in the Fall of 1902 and the beginning of 1903 was the panicky condition on the part of the people thinking they were not going to get enough fuel to keep themselves warm, and also because a number of manufacturers in New England, who were making very great profits out of their business, feared that they would not get enough fuel to run their plants, and bid excessively high prices to get it, and ran the price of coal up to an abnormal degree.

Q. In other words, it was the fear, as you assume, of the consumers that sufficient coal would not be transported to the market to enable them to get what they required?

A. The fear on the part of the consumers and the railroads that they could not get all the coal they wanted, and they wanted to be well protected.

Q. Are not these the facts? The strike in the anthracite coal fields—the long strike, the last long strike, occurred in 1902, did it not?

A. Yes, 1902.

Q. It was following that strike that these very high prices prevailed?

A. Yes.

Q. There were a large number of railroad companies which had been formerly accustomed to using anthracite coal for their fuel supply—that is, for use in their locomotives?

A. Yes.

75 Q. And they were compelled, were they not, to draw from the bituminous fields?

A. I do not know to what extent that was. The anthracite railroads used a very much larger proportion of bituminous coal ordinarily for the running of their road than is commonly supposed, and when the anthracite strike occurred, of course their business was reduced. How much they had to substitute soft coal for anthracite I do not know.

Q. But there was that substitution?

A. After a time it was necessary.

Q. The railroads had been using anthracite?

A. Undoubtedly.

Q. And that resulted in a large number of foreign railroad cars coming into the bituminous regions, which had theretofore been used by those companies for the transportation of anthracite, which they had been burning?

A. That is possible. I do not know. It is possible.

Q. You know this, do you not, that the Clearfield coal, the coal

produced in the Clearfield region, having the lowest freight rate, is the coal which the railroad companies used for their fuel mainly?

Mr. GLASGOW: What roads do you mean?

Mr. GOWEN: Any railroads drawing their supply from the bituminous fields adjacent or tributary to the Pennsylvania Railroad lines.

The WITNESS: Do you mean their entire consumption?

By Mr. GOWEN:

Q. I mean railroads like the Lehigh Valley and the Philadelphia & Reading and the New England roads, like the Delaware & Hudson and the Boston & Maine——

A. And the Delaware, Lackawanna & Western?

Q. They do not draw their supply of bituminous coal from
76 the Pittsburg fields, or the other fields west of the mountains, but draw their supply from the Clearfield region?

A. And from that known as the Latrobe & Westmoreland districts.

By Mr. GLASGOW:

Q. And the Fairmount?

A. Yes, and I think they also draw from the Fairmount.

By Mr. GOWEN:

Q. I am speaking of bituminous fields tributary to the Pennsylvania Railroad?

A. Yes, sir.

Q. The Latrobe & Westmoreland coal sells at a higher price than Clearfield?

A. I do not know about Latrobe. I could not say. I think in some instances they sell as low.

Q. The Westmoreland commands a higher price?

A. What we know as the Westmoreland Coal Company would, yes.

Mr. GLASGOW: I do not see the pertinency of this.

Mr. GOWEN: I want the witness to state that the railroad fuel supply of the eastern railroads which is drawn from the territory tributary to the Pennsylvania Railroad comes almost entirely from the Clearfield district.

Mr. GLASGOW: What bearing could that have on this case?

The COURT: I think it is relevant.

By Mr. GOWEN:

Q. Is not that the fact?

A. It comes, largely so.

Q. Does not 80 per cent., at least, of it come from there?

A. I would not fix the percentage, for I do not know it.
77 That has changed very much in recent years. The Latrobe Coal Company, by reason of the reduction in freight from the

Westmoreland district, has increased its proportion of supply for railroad purposes.

Q. How late has that change been made?

A. I do not recall when the change was made. Several years ago.

Q. It was only a year or so ago?

A. I do not remember now. Several years.

Q. That lower freight rate was prevailing from the Latrobe region during the period of this action?

A. I do not know. I could not say.

Q. I hand you the sales book of your company, to show the prices realized for coal beginning in June, 1902, and I will be glad if you will state now whether that does not show that in the month of June and throughout the succeeding months in which the abnormally high prices for coal prevailed, the Morrisdale Coal Company sold at high prices a considerable part of its output?

A. This book shows the sales of the Morrisdale Coal Company each month, through its various offices of Philadelphia, New York and Boston—it shows all the sales, both those taken from the mines on the Pennsylvania Railroad and those taken from mines that are not tributary to the Pennsylvania Railroad at all; also the sales of coal which were purchased and re-sold, having no bearing on this situation at all, and we arrived at the average of sales—while it is not absolutely correct——

Q. I did not ask about the average.

A. I am going to give the average for each office, the average selling price of each office.

Q. I did not ask you that question. If Mr. Glasgow wants that he can bring it out. I want to know whether this book does not show that a considerable part of the coal sold by the Morris-
78 dale Coal Company during the period of abnormally high prices was sold at the ruling high prices?

A. In order to answer that question understandingly, I would ask you to fix what would be a high price.

By Mr. GLASGOW:

Q. State what the prices were that it was sold at?

A. I am prepared to do that.

By Mr. GOWEN:

Q. What was the maximum price then that you realized in June for a portion of your coal—June, 1902?

A. Coal sold for shipment f. o. b. cars at the mines, there appears to have been a sale of 340 tons, at $4.75. That seems to be the highest price.

Q. There were other sales made at the price of $2.60?

A. Yes.

Q. There appears to have been one for $3.25?

A. Yes. That is in June.

Q. Now in July?

A. And we paid in purchasing coal in that month an average of $1.93. I do not know what the highest price was.

Q. I have no objection if you want to state the average price realized that month?

A. The average price realized——

By Mr. GLASGOW:

Q. Give the items showing the highest price for coal in accordance with the question. In July you have not given it.

Mr. GOWEN: He is going to give the average of June—the average price realized.

The WITNESS: The average price on coal sold through shipment to lines through the Philadelphia office was $1.23, at the mines.

79 The average on coal sold to the Boston office was $1.18 at the mine, for a portion of it. Another portion was $2.43.

By Mr. GLASGOW:

Q. Does that include in the prices the deliveries upon contracts which had been made prior to that time, but which deliveries were made during the month?

A. It does. It includes the sales.

Q. It includes that, too?

A. Yes, all sales.

Q. Then, as a matter of fact, when you give the average, it does not show what the market value of coal during the month of June was except the market value of all you sold, taken into consideration with what you had contracted to sell prior thereto?

A. That is true, because here is some coal sold at $1.15 a ton.

Q. And others at $4.75 a ton?

A. Yes.

Q. When you say $1.15 a ton, would that mean coal that was delivered during that month under contracts prior made?

A. That is correct.

By Mr. GOWEN:

Q. I understand, in giving the average price realized by the Morrisdale Coal Company for all coal which they sold in June, 1902, you have embraced all coal whether sold and delivered under contracts or sold and delivered from day to day, as the market would take it?

A. That is right for the various offices. Coal sold through Philadelphia again, $1.85 at one point and $1.35 at another point.

Q. Those are averages?

A. Those are averages.

By Mr. GLASGOW:

Q. What month was that?

80 A. The month of June. $1.35 was coal that was sold almost exclusively, apparently, under contract. There was one portion to contracts and one portion to new business.

Q. July is the next.

A. In June, again, in New York, $1.24, and a portion of it at

$1.37, depending on the ports from which it was shipped. Do you want July?

By Mr. GOWEN:

Q. Yes.

A. $1.20 for Philadelphia business, of that line. Some of it was sold at $1.15, $1.00, $1.25, $1.10, $4.75, and so forth.

Boston office, $1.19. That appears to be their average.

By Mr. GLASGOW:

Q. What was the highest price there?

A. Through Boston that month, $4.15, $3.95, $4.35, $4.05, $4.00, $5.40, and at the harbor of Philadelphia, the shipments there were $1.21 and $1.28. It is not separated from the freight, so as to bring the highest price and the mine price in it.

New York, $1.31 and $1.44. Some coal was sold at—it is not separated from the freight, either.

August, Philadelphia, $1.15. Some of it sold for $1.10, $1.15, some of it at $2.85 and $2.70.

Boston, $1.10. A little of it was sold at high prices, like $4.00, $3.95, $4.05, $5.00, $4.40, and the balance at lower prices, under contract.

In the harbor of Philadelphia $1.83 and $1.72.

New York $1.30 and $1.38.

Q. What month was that?

A. August.

September, Philadelphia, $1.43, $5.95, $4.00, high prices. Then $1.10, $1.15 and so on.

Boston $1.28, some at $4.15, $5.00, $5.30. Then at $1.10 and so forth under contract.

At the harbor at Philadelphia, it has not been worked out for the month. I cannot say.

81 New York $1.37 and $1.28.

Q. What month was that?

A. The month of September.

The month of October has not been worked out at Philadelphia, but the Pennsylvania Railroad paid us $5.25 for some coal they confiscated that month, and then we sold others at $5.00 and $6.00 and $5.75, a little of it, and the balance went in at $1.10, $1.15 and so on. Over $2.00 would be the average.

Boston office $1.81. Some of it as high as $4.15, $3.85, $5.00 and the balance under the contract.

Philadelphia harbor $1.15 and some of it $1.07.

New York it appears to have been $2.04 a ton.

By Mr. GOWEN:

Q. The average?

A. The average, some of it being $8.50 for coal, and $8.25, some of it. $5.00, $2.00 and $2.75, a great deal of it.

By Mr. GLASGOW:

Q. What month was that?

A. The month of October. Another port in New York, $3.48, at various prices ranging from $8.00 a ton down. The bulk of it at $2.75, $2.75 and $3.00.

November, Philadelphia $1.43. Some of it at $5.90, $5.15, $1.20, $1.25, $1.15, and so forth.

Boston, $1.43. The highest price there was 125 tons, $7.00. The balance $1.10, and so forth.

Philadelphia harbor has not been worked out as an average.

New York, month of November, 1902, $1.18. Another port, $2.36.

December, $1.76 appears to be the Philadelphia average. The Pennsylvania Railroad apparently took a good deal, and paid us $6.35 for some and $7.35 for some. That is the month of December. That increased the average very greatly. The Pennsylvania Railroad took it, much to our annoyance at that time.

82 In the Philadelphia harbor $1.15.

New York, December, $1.28, one port, and $1.39 from another port in December. That was about the highest price, I think.

January, Philadelphia apparently was $2.37. The Pennsylvania Railroad again helped themselves, more than I had thought they would have done.

By Mr. GLASGOW:

Q. What was their price?

A. The price they paid us, when they took the coal, $6.05, $5.20, $4.10, and $6.25, which they objected to at the time, but finally consented.

In the harbor at Philadelphia $1.18.

New York, where the coal the Pennsylvania Railroad Company took was outstanding to meet obligations, $1.39 and $1.39. One port as high as $1.72. That runs through January. Shall we go any further?

By Mr. GOWEN:

Q. No; I think that is far enough.

A. Of course, those figures are not absolutely accurate.

Q. You have referred to various market prices paid to you by the Pennsylvania Railroad Company for coal that you say they took?

A. Yes.

Q. That means coal which was in transit on their lines, and which they took for their own use?

A. I always understood they took it for their own use. It was in transit on their lines.

Q. The price which they paid you was the price you claimed you could have secured for the coal at its destination?

A. The price that they paid us when they took the coal from us—

of course, it interfered with the delivery of coal on other business, and they wanted to pay very much less money. I represented to the Pennsylvania Railroad Company that we had to pay in
83 many instances more money than we asked of them, to replace the coal, to meet the obligations, so that they finally, after some little discussion, consented to pay.

Q. But your claim was, was it not, in all those cases, that if that coal had not been taken by the Pennsylvania Railroad Company, it would have been sold for the figures they paid?

A. No, I do not think I ever claimed it that way. It could have been sold for the figures which they paid, but we would have had to replace the coal for carrying out obligations at the figures they paid, or even in some instances more.

Q. Have you any correspondence with them on that subject?

A. Not that I recall, but there were several interviews—frequent discussions.

Q. You know during this period of high prices, that there was very considerable uneasiness—not to say alarm—among the consumers of coal?

A. There was.

Q. And they were actively bidding for it at the mines—at least, the middle-men were actively bidding for the coal at the mines?

A. The coal market was very active.

Q. And the prices paid were very high for coal?

A. They were.

Q. There was no difficulty, I suppose you will say, as to producing all the coal they required?

A. No, I should not think there was.

Q. The difficulty was purely a transportation problem, was it not?

A. I think so.

Q. The difficulty was to get the coal to market?

A. Yes.

Q. Which the consumers wanted immediately?

A. Yes.

Q. And that led to high prices?

84 A. Yes, that led to high prices, and of course that coal had to be secured to meet the obligations, and we ourselves were compelled to bring a great deal of coal from the port of New York in order to meet the obligations entered into, to cover that deficiency.

Redirect examination.

By Mr. GLASGOW:

Q. When you spoke of the Pennsylvania Railroad Company having confiscated coal, you meant coal that was on their line that was taken by them, and for their own purpose, whatever it may have been?

A. Coal that was destined to other points, shipped from the mines, and consigned to some point, which they took in transit.

Q. You mentioned a number of items where they paid you for coal. As I understood you to say to Mr. Gowen, they paid you

approximately at least the price which you would have had to pay for the coal to supply the party to whom it was to go?

A. The price which we did have to pay for it.

Q. Mr. Gowen has referred to what is called fuel cars, fuel coal for the purposes of the Pennsylvania Railroad Company. As I understand you, the Pennsylvania Railroad Company makes certain contracts with coal miners in the Clearfield region for the delivery of coal to it in cars at the mine?

A. I understand it so.

Q. Do you sell your coal, or any of it, for delivery in cars at the mine?

A. No; I think we have sold the Pennsylvania Railroad——

Q. I am not talking about the Pennsylvania Railroad. I am talking about any other coal. Is it sold at the mine f. o. b. the cars?

A. Yes, some of it is.

Q. That is a very usual thing for coal going to market?

A. Yes.

85 Q. To be sold f. o. b. the tipple, the mines?

A. That is the usual basis, except coal sold at tidewater, which carries with it freight and delivery.

Q. That is a delivery price?

A. Yes; for coal mined and shipped to the consumer or consignee from the mines to his point of consumption in the railroad car, it is ordinarily bought at a price f. o. b. the cars at the mine.

Q. And that is the same method as adopted as to the sale of fuel coal by the railroad company?

A. Precisely.

Q. Then the railroad company sends cars to the mine to transport that coal for the miner, to such points on the Pennsylvania Railroad as it may be desired to carry it?

A. It does.

Q. The cars which are used by the Pennsylvania Railroad for the purpose of removing that coal from the tipple of the shipper—could those same cars be used in interstate commerce, or in carrying your coal, or coal of other shippers to New Jersey or New York? Could the same cars be used by the mine owner?

A. They are used.

Q. The same cars?

A. The same cars. It may be that the Pennsylvania fuel supply today, would go through South Amboy or Hartford, Connecticut, tomorrow.

Q. Then if those cars are taken out of the total cars in the region, and arbitrarily given to some shipper, without charging them up against him, to what he is entitled to under his percentage, that takes out of the use in the interstate commerce so many cars. Is that correct?

A. It does, and it reduces the amount of cars that distribute in that way.

Q. The individual cars referred to by Mr. Gowen, they are cars owned by the mine owner or operator, which he allows the

86 railroad company to use upon the payment of certain wheelage or rental?

A. He receives a rental from the railroad company, what is called a wheelage, 6 mills a ton a mile run for those cars. They carry his coal from his mines, or wherever he places them—at whatever mine he places them.

Q. The railroad company pays the mine operator for the use of those cars?

A. He does. The railroad company pays a wheelage, of six mills upon a mile run for one car.

Q. Then those cars go into the field, and are distributed to the owners of them at their mine?

A. Either to the owners, or, if they elect to place them anywhere else, they place them.

Q. To such person as the owners might designate?

A. Yes.

Q. Then, under the system which the Pennsylvania Railroad Company had in effect during the period covered by this suit, they did not charge those cars against the number that the person who had them was entitled to under his percentage?

A. No. During this period of time they always informed me that those were all eliminated, and what was left of their own equipment was divided among the various mines, on the pro rata basis.

Q. Then the foreign railroad fuel cars, cars coming in every day, the Philadelphia & Reading or the Lehigh Valley—they are used by the Pennsylvania Railroad Company for transporting coal from mines to those railroads?

A. Yes.

Q. And they are placed at mines where the foreign railroad, as you call it, has purchased coal, and are shipping that coal, and they are not charged against the number which the party using them is entitled to under his percentage. That is true?

A. During this period of time they used the foreign rail-
87 road cars in precisely the same way that they used the individual cars or their own fuel supply cars, exclusively. They have changed that now.

Q. They have changed it now?

A. They have changed that situation.

Q. They are counted now?

A. In a manner. In a measure they are counted now.

Q. The individual cars are now counted in a way?

A. Yes.

Q. And the fuel cars?

A. Yes.

Q. The railroad company's own fuel cars are counted?

A. Yes.

Q. That has been since 1906, has it not?

A. I think 1906 was the time.

Q. The railroad company changed the rules so as to count, in a manner——

A. They did.

Q. —these cars against the party using them?

A. They did.

Q. After taking out these cars which they assigned arbitrarily to these mines using them, and did not count them, then what cars are left they divided on this percentage basis?

A. They did.

Q. During the period covered by this account, have you counted at your mines all the cars which were received by your mines of every kind and character?

A. We have.

Q. Individual, fuel or anything else?

A. We have counted all the cars.

Q. And any deficit in cars which your shipment shows is a deficit after counting all the cars of any character which were used at your mines?

A. That is correct.

Q. And these ten cars which Mr. Gowen speaks of, and as
88 you have already said how you got the ten cars a day, if they were furnished to you, they were counted in this statement, against what you were entitled to under your percentage?

A. Yes, undoubtedly. It was on the sheet, and we have taken everything off the sheet, as it appears on it.

Q. Did you have a conversation with Mr. Trump about the car service which you were getting up there in 1902 and 1903, and as to cars?

A. Frequently; and also with the vice-president of the railroad and the general manager.

Q. Did they say anything to you about the service you were getting.

A. Yes; we discussed it very frequently.

Q. And can you tell the jury what they told you as to the difficulty you were suffering under?

A. The vice-president, who was at the head of that department—I always so understood——

Q. Who was that?

A. Mr. Prevost—he admitted repeatedly, when I showed him these various statements, that our situation was a very unique one, and he did not know that it was paralleled anywhere on their system, that we had a very large plant, that it cost a great deal of money to put it into position and develop it, and we could not get transportation enough to keep it running, with any profit, or in fact, in any proper shape at all, and he said, "How can I help you out, because I will do anything I can, within reason?" I said, "Mr. Prevost, I don't see how, unless you give us more cars. It is up to you, as a railroad man, to devise a method by which you can transport this coal." I said, "As it is now going with the percentage you have, you will have to put 1,000 cars a day in that region, in the distribution, to give us sufficient cars, and you cannot do it. You never did do it, and you will never be able to do it,'" which he ad-
89 mitted, and the first way in which we came to get the ten cars per day I think was in 1901, when they first commenced running steel cars, and I went to Mr. Trump and Mr. Hutchinson, and asked them to run the steel cars over to us, and their

reply was, "That they cannot go on that railroad, on that branch, the bridges won't bear them, and the people cannot load them." I answered that there would be only one bridge between their new line and the Morrisdale mine, and I thought it would bear the steel cars as well as any bridge on the railroad. Finally, after a good deal of discussion, he agreed to look into the question, and see whether he could place them there. They then made a reply later on that they could, but no other operator in that region could take the steel cars, that the tipples were not high enough, the tracks would not bear them, and all sorts of good railroad reasons, I suppose. Then they commenced to run steel cars to us, ten a day, I think it was, and then they told me later on that it attracted some attention, that other operators were complaining about our getting these cars, and they stopped it, and we referred to my statement, not once but frequently, to the Pennsylvania Railroad Company, that we could not do business by favor in that way, because we never knew where we stood, and our obligations at tidewater, especially with the steamship companies, must be carried out, that we entered into with them, and we must have a reasonable degree of assurance as to what we could do, and when the year 1903 was coming on, after all this difficulty in 1901 and 1902—or 1902, it was, I went to them again, and I said, "Mr. Trump, we are about entering into a year's business. I have had so much trouble in the past two years, we have lost business and lost position with the consumer, because I could not carry out the obligations I had made. I want to know whether you can assure us of a reasonable car supply for this year." Their reply was that they could, and they started in, and January and February and March we got a very good car supply, but not ahead of what our percentage would
90 entitle us to. None of us foresaw the anthracite strike, which was coming. When it came, the market was exceedingly active, and their car supply seemed to diminish very materially, and we had obligations, and we were up against a stone wall. We did not know what to do, with this mine costing us at least $1500 to $2000 a month, in idleness. Then I said to them, in the Fall of the year, I think it was September, "I will offer to build 150 cars, for immediate delivery." I said, "Mr. Prevost, will you allow us to build them? Maybe it will help us out." He said, "We are opposed to anybody putting cars on this line unless they will build 500 as the minimum, and they must build steel cars."

Q. Did anybody there have 500 at that time?

A. Yes; two or three. The Berwind-White Coal Company had 500; the Pennsylvania Coal & Coke Company had 500, the Westmoreland Coal Company, the Keystone Coal Company and, I think Jamieson, and maybe some others. I do not know. I said, "We cannot get steel cars under ten or eleven months' delivery. The Allison Manufacturing Company tell me we can get these in about sixty days to three months. 150 is all they will build, all they can give us." We discussed the question between Mr. Trump, Mr. Prevost and myself. Finally they assented to us building those cars, and I said to them at the time, "We do not want to build them, it

is not for us to build the cars, it calls for an expenditure of $135,000, and I cannot figure any way that I will get this back out of the wheel service at all. I do not see how it is possible, but this mine is costing us so much in idleness, our business is being hampered, and we are willing to use that method to help us out. That is the way we came to get the individual cars.

Q. Then you got 150 cars, did you not?

A. Yes.

91 Q. And that is counted in the statement as against what you were entitled to under your percentage?

A. Yes. I have always contended with them that the percentage should be a percentage of all the cars that came into the region, irrespective of what kind they were. We had a conference once with Mr. Thayer and Mr. Trump—I do not know as Mr. Hutchinson was present then, in which I defended the same position, and I have always taken the ground that every car, whether of a foreign railroad, fuel, supply, or individual, should be counted, in making up the percentage basis upon the capacity of the whole region.

Q. I want to call your attention to this statement which you had prepared which you have before you there. During the month of March, 1902, you appeared to have loaded and shipped 204 cars more than the percentage which you were entitled to?

A. Yes, that is right.

Q. During that same period the Berwind-White Company *have* their entire percentage?

A. This sheet shows they had 54 cars more than their proportion.

Q. That sheet is taken from the Pennsylvania Railroad sheet?

A. Yes.

Q. During the month of April you had 295 cars in excess?

A. We did.

Q. And the Berwind-White Company were short ten cars?

A. Ten cars.

Q. And during the month of May you had 187 in excess?

A. Yes.

Q. And the Berwind-White Company had nine short?

A. Nine short.

92 Q. After the month of June, as I understood you yesterday, you said the price of coal during that period was comparatively low?

A. Yes, because the market had not commenced to feel the anthracite strike then.

Q. You said in June the market began to increase?

A. Commenced to go up.

Q. From June, 1902, down to and including January, 1903, did you ever at any time manage to get the number you were entitled to under your percentage?

A. No. We were behind every month.

Q. And during that same period, from July, 1902, to January, 1903, inclusive, the Berwind-White Coal Company got in excess of the amount they were entitled to under their percentage, except the month of August, 1902?

A. That is right. They were cars short in the month of August, 1902.

Q. Then it appears that, in the month of February, 1903, you had 39 cars more than your percentage called for?

A. We did.

Q. And you make no claim during that month?

A. None.

Q. During the same month, how many cars did the Berwind-White Company have in excess of their percentage?

A. 591.

Q. In the month of June, 1903, you had 18 in excess of your percentage?

A. We did.

Q. How many did the Berwind-White Company have in excess of theirs?

A. 307.

Q. In the month of January, 1904, you seem to have had 65 in excess of your percentage?

A. That is right; 65.

Mr. JOHNSON: We object to this because it is not re-examination on the cross-examination.

93 The COURT: I really cannot see the advantage of going over it again.

Mr. GLASGOW: I am not going over it again, except in so far as Mr. Gowen tries to question the statement of Mr. Wigton, on cross-examination, that other people did not get all the cars they wanted.

The COURT: The point is, we have the figures already, and you can draw any inferences or argument you please from them, without going over them again.

By Mr. GLASGOW:

Q. About the coal, or some part of the coal, which was shipped out by way of the New York Central. Were you able, in addition to such coal as was shipped by the New York Central, to have filled your percentage of cars, if they had been furnished to you by the Pennsylvania Railroad?

A. I do not think I quite understand the question.

Q. Would the fact that you had taken some of your coal out by underground passage and shipped it by the New York Central, have prevented you from filling and shipping all the cars that you were entitled to under your percentage, if the Pennsylvania Railroad Company had furnished them?

A. No; we could not only fill all we were entitled to, but all we were rated, because our actual working capacity was in excess even of their rating for us, as was evidenced when we had the cars and loaded them.

Q. So that your percentage of the cars, or the cars that you were entitled to under your percentage, from the Pennsylvania Railroad, you needed in addition to any service you might have had from the New York Central?

A. Yes.

94 Q. Then, as I understand you, the coal that you used for filling contracts from other mines, in order to take the place of that coal you bought other coal in the market? For instance, you had other mines in other districts and you used that coal by reason of the deficiency that occurred by reason of the Pennsylvania Railroad not furnishing you cars, you used that coal on the contracts and then you bought other coal in addition to that?

A. We bought other coal to fill in.

Q. You were engaged in business, that is, the Morrisdale Coal Company, both as coal merchants and as miners and operators of coal property?

A. Yes; both as operators producing coal and as merchants selling that, and also as merchants buying other coal.

Q. And you bought and sold in the period, as shown here, coal over and above the amount that you were entitled to under your percentage from the Pennsylvania Railroad?

A. We did.

Q. In making your contracts for the period covered by this claim, were you in any way guided as to the amount of coal you were to contract to sell, by the percentage which was awarded to you by the Pennsylvania Railroad, and the assurances of delivery under it?

A. Yes; we have to be guided——

Mr. JOHNSON: I object to "and assurances of delivery under it". We have now a question which has assumed a fact, and if there were assurances, he had better ask whether there were and what they were. I object to the question, therefore, as containing in it an assertion of fact which has not been established.

Mr. GLASGOW: Mr. Johnson fails to recollect that this witness a few moments ago said that in the Fall of 1902 he went to the Pennsylvania Railroad officers and told them he was then ready to
95 make his arrangements for the coming year, and that they gave him assurances that he would have shipped over the line the amount of coal that his percentage called for.

The COURT: There is such testimony. If you confine your question to contracts made after that time, you may ask him that.

By Mr. GLASGOW:

Q. After that conference in 1902—I cannot recall the date?

A. I think it was in the beginning of 1903, or thereabouts.

Q. Were you then governed by what your percentage called for in making your arrangements for delivery of coal under contract?

A. I felt very much relieved, after the stress of the preceding year, and started in to do business with the expectation that we would have a better proportion, or supply, of cars than we had been receiving.

Q. Did you rely upon that statement in making your contracts?

A. We certainly did.

Q. Had you previously relied, or is it usual for you to rely on that percentage as to the coal which you should contract for?

A. Not exactly. As a coal operator I would not want to contract for more tonnage for the year than my estimated capacity as fixed by the Railroad Company, and then I would want to limit that to

what my general knowledge would show me was the average fair car supply for that district.

Recross-examination.

By Mr. GOWEN:

Q. Have you seen that statement which we submitted to your counsel, showing the total cars delivered to the Berwind Com-
96 pany, divided into the cars delivered by the Pennsylvania Railroad for its own fuel supply, the individual cars of the Berwind-White Company and Pennsylvania system cars?

A. I have seen that statement. (Referring to statement in possession of Mr. Glasgow.) If this is the copy or fac simile, I have.

Q. That statement was submitted for your inspection in order that you might determine whether or not the figures contained therein were correct or incorrect, was it not?

A. That is my understanding of it.

Q. In stating as you have done in answer to Mr. Glasgow's question, that, from month to month, there was an excess of cars shown to have been delivered at the Berwind-White Company's mines, you have ignored entirely the fact, which you know to be a fact, that they had a large number of individual cars, which they were entitled to the exclusive use of, and that they were also furnishing fuel coal to the Pennsylvania Company?

Mr. GLASGOW: I object to that, because he assumes that Mr. Wigton knows the proper solution of the question of law in this case. I deny absolutely, as his counsel, and he will if he knows what the law is, that the Berwind-White Company were entitled to the absolute use of these cars.

The COURT: Srtike out that phrase and let him answer the question.

Mr. GLASGOW: I have no objection to the question in that form.

(Question read as follows: "In stating, as you have done in answer to Mr. Glasgow's question, that, from month to month there was an excess of cars shown to have been delivered at the Berwind-White Company's mines, you have ignored entirely the fact, which you know to be a fact, that they had a large number of individual
97 cars, and that they were also furnishing fuel coal to the Pennsylvania Company?")

A. I have not ignored the fact at all. I had no idea that the Berwind-White Company were furnishing any fuel coal to the Pennsylvania Railroad, until I saw reported on the daily sheets from which this summary is made, that some of those cars were Pennsylvania Railroad fuel coal, and these sheets are the summary of all the cars they received.

Q. Then you saw on those sheets, from which that statement was prepared, that of the cars placed at the Berwind-White Company's mines, some were placed for fuel coal of the Pennsylvania Railroad, some were individual cars of the Berwind-White Company, and the balance were Pennsylvania Railroad system cars?

A. Under each heading—the Pennsylvania, on their sheets had

various headings describing the cars, and the numbers were placed under them.

Q. You have never verified the summary which was sent to your counsel showing the aggregate number of fuel cars, the aggregate number of individual cars and the aggregate number of Pennsylvania Railroad system cars which were delivered in the months to which you have confined your action, to the Berwind-White Coal Company?

A. I have verified the aggregate number of cars on that sheet, but I have not verified, nor has there been separated on this summary, the amount of fuel cars or amount of individual or foreign cars.

Q. Then I understand it to amount to this: that if the Berwind-White Coal Company are entitled to the exclusive use of their individual cars, and if the Pennsylvania Railroad Company is justified in placing at the mines of the Berwind-White Coal Company cars for its own fuel without regard to the question whether or not that may give the Berwind-White Company more cars than you
98 got—that, if those two conditions are true, then you are unable to state whether or not the Berwind-White Company got any cars which they were not entitled to?

Mr. GLASGOW: I think I can relieve Mr. Gowen in accordance with what we understand between each other. We will admit in this case—and I will for Mr. Wigton—that if the cars of individual coal operators are not to be counted in the distribution, but are to be assigned arbitrarily to that operation or to the persons designated by it; if fuel cars for the Pennsylvania Railroad are to be assigned to the party using them, shipping coal for the use of that company, and not count those cars against the percentage to which the man using them is entitled; if the cars of foreign railroads sent into the mines and used by them are to be treated as arbitrary allotment and not counted against the number of cars that the man using them is entitled to under his percentage; then we have no claim here which we can assert, for we think that, after taking out all of these arbitrary allotments of cars, that the Pennsylvania Railroad Company has given to us the percentage of this small residue which is left.

Mr. JOHNSON: I want him to admit that he is not prepared to prove, and has not offered any evidence to show, that the Berwind-White Coal Company received more than their proportion of the Pennsylvania Railroad cars belonging to it. That is all we want to fix.

Mr. GLASGOW: I want to further this as far as I can. I understand that Mr. Johnson wishes me to admit that, if the Berwind-White Company are entitled to the use of their individual cars without counting them against what they are entitled to under the
99 percentage, then the Berwind-White Company did not get any excess of what their percentage was?

Mr. JOHNSON: Of the Pennsylvania Railroad's own cars.

Mr. GLASGOW: I cannot go quite that far, because I do not know what is the number of the fuel cars.

Mr. JOHNSON: All I want you to admit is that you have offered no proof and are not prepared by evidence to show that the Berwind-

White Coal Company received of Pennsylvania Railroad cars during that time more than their proportion.

Mr. GLASGOW: I will admit this: that we are not prepared to show that the Berwind-White Company received more of the Pennsylvania Railroad Company's own cars than it was entitled to under this percentage, if these other cars which I have mentioned were to be deducted before the distribution was made.

By Mr. GOWEN:

Q. Coming to the purchase by you of the 150 individual cars, that purchase was made in the early part of 1903, you have testified?

A. I think the deliveries were made then; the purchase, I think, was made in the Fall of 1902.

Q. There was no difference made between you and any other operator in the method of counting those individual cars, was there, after they came on the road? You were not treated differently as to your individual cars from any other operator, were you?

A. Not that I know of. I do not know.

Q. As far as you know, they were not charged against your proportion, nor were they charged against the proportion of any other operator?

A. I don't know.

Q. You do not think they were, do you?

100 A. I think they were treated just like anybody else running individual cars.

Q. You were asked as to the amount paid by the Railroad Company for the use of these individual cars, and you said that it was six mills. That is the rate that is paid by the Pennsylvania Railroad Company and all other railroad companies for the use of other cars, whether they are railroad or individual, is it not, the same rate?

A. I think so.

Mr. GLASGOW: May I just remark to your Honor one further word, in connection with the admission; if the Berwind-White Company's cars, which I have mentioned, should not be counted, your Honor will understand that our claim falls, if that is determined, because we have gotten what cars we were entitled to on that basis.

By Mr. GOWEN:

Q. Referring to the conditions that existed during the latter part of 1902, was not the state of affairs existing in the coal trade at that time an unusual state of affairs and resulting from a very unusual situation?

A. The conditions which existed at that time, during that anthracite strike difficulty, the pressure was very heavy and brought about an unusual condition in the market, and, as the officials of the Pennsylvania Road had said to me when I wrote for cars in the Fall of the year, "Well, there is certain steamship business that must be taken care of and it must be kept running." I contended that ours ought to be kept running, too, and we did not get quite enough cars to do that, and the condition was a very abnormal one, or we would not

have been forced to bring coal from Great Britain, as some others were also.

Q. And that condition resulted from a general inability to get the coal to market as rapidly as the consumers wanted it?

101 A. Yes, I think that was the basis of it.

Q. I have had occasion to refer to the testimony which you gave before the Interstate Commerce Commission. I want to read you another extract from your testimony and ask you whether you are prepared to state that that is a correct statement of the conditions existing at the time, or whether you want to correct your statement. (Page 35.) I put this question to you: "Q. The difficulties which arose in the prompt delivery of coal during that winter (which is the winter of 1902-1903) were largely conditions which resulted, not from a shortage of cars, were they, but from inability to move the traffic rapidly?" You answered: "That was the weather condition, that is true, right in the middle of the winter; but the car supply, so far as we are concerned, speaking for myself, was practically all through the year. Q. Now that shortage resulted from carrying out the method of distribution, did it not? A. I do not know what the method of distribution was. Q. Whatever it was, you do not think you were individually discriminated against at that time? A. No, sir; I do not think that. Q. It was a question of the failure of methods in force to accomplish the best results? A. All their facilities were taken up for cars that were not counted in the distribution. Q. That is, individual cars and fuel cars? A. Yes, sir. When these facilities were taken up, there was not enough left to furnish anybody with cars." Do you recall that?

A. I recall that, and I can state that that is in effect correct, because the discussions with Mr. Prevost led to this diclosure, that of approximately some 300 cars per day that went into that district, approximately 240 were not counted in the distribution at all, which left in the neighborhood of some 60 cars which were distributed, of the Pennsylvania's equipment, and our percentage on that number was given us fairly, and I think was given to any others, and

102 they put to me the question, "Why don't you go and sell coal to the Boston & Maine and the Lehigh Valley and some other railroads and get these fuel cars to help run your mines?" My answer to that was, in effect, that there were good reasons why I preferred to market coals in other directions and I did not want to be confined or dictated to as to where I should sell coal, especially when these people were selling coal at a very low cost by the car. I do not think we were discriminated against in the effect that we did not receive our percentage out of the manner of distributing cars.

Q. Then you do not think you were discriminated against in that you did not receive the number of cars which were treated by the Railroad Company as allotable or distributable cars?

A. I do not think we were. I have no ground to say we were.

Redirect examination.

By Mr. GLASGOW:

Q. As I understand the situation, if the complaint you make that if they did not count these cars, individual, fuel, and foreign fuel cars which have been spoken of—if it should be held that it was proper for them not to count them, then your conclusion is that you were not discriminated against in the distribution of the residue and you got your percentage of what cars were left. That is your position?

A. As I said to them then, "Simply put 60 cars a day more in the region and nobody will get any cars except the few that own these cars; you will cease to be a common carrier and we are off the map entirely." I said, "I do not think for a moment you are discriminating against us in distributing the cars that remain after you have eliminated everything you do not count."

103 Q. But your claim of discrimination is that, before they distributed on the percentage basis, they took out a large proportion of the cars which could be used for the pro rata hauling of coal and gave them arbitrarily to other people?

A. Yes.

Q. Something was said about individual cars being used, assigned as somebody else's. Is it a matter of fact that you have always taken the position with the Pennsylvania Railroad that all cars should be counted?

A. Always.

Q. At all times?

A. Always; at every discussion.

Q. Both before and after you got the individual cars?

A. Yes, sir.

Q. And while they were there?

A. And while they were there.

Q. In this statement of yours, your individual cars are counted, are they?

A. Yes, sir.

Recross-examination.

By Mr. JOHNSON:

Q. The question was one of car shortage, was it not? There was an insufficient number of cars to transport all the coal that could have been mined; that was the question, was it not?

A. There were not enough cars to transport all the coal that could have been mined.

Q. And what you claim is, that you should have been entitled to use a part of the cars that the other operators had bought and paid for themselves? That is what you rest your claim on, is it?

A. Not exactly.

Q. If you can show us in what ways it differs, I would be glad to have you do so.

A. The railroad enters the region and arbitrarily makes
104 a rating upon which to base capacity, and our proportion of that capacity is the percentage we bear to the aggregate of all. If they are going to furnish cars practically up to their ability to transport and then eliminate all that they want to and leave very few, you get a rating or capacity of your mine which is, in that view of it, decreased proportionately.

Q. All I want to know is whether you claim that you were short because you did not get a certain portion of cars that belonged to other operators?

A. I claim we were short because we did not get the percentage of 4.8 of all the facilities to transport coal that went into that region.

Q. Including cars belonging to other operators?

A. Including all kinds of cars.

By Mr. GLASGOW:

Q. As I understand you, your claim is not based, as Mr. Johnson suggests, on the idea that you ought to have had assigned to you the cars of the Berwind-White Company which were owned by them, but that, when tonnage was hauled by the Berwind-White Company in those cars, the use of which was paid for by the Pennsylvania Railroad Company, that that tonnage hauled in those cars should have counted against Berwind-White Company on the percentage to which they were entitled?

Objected to by Mr. Johnson.

The COURT: I think both theories are now sufficiently well disclosed.

(At 12.35 p. m. a recess was taken until 2 p. m.)

FRANK W. MUENCH, having been duly sworn, was examined as follows:

By Mr. GLASGOW:

Q. Where do you live?

A. Philadelphia.

105 Q. What is your business?

A. Bookkeeper.

Q. For what concern?

A. The Morrisdale Coal Company.

Q. Did you make an examination of the car distribution sheets of the Pennsylvania Railroad Company for the months covered by the statement which I introduced yesterday headed, "Summary of cars placed in the Clearfield region by months taken from the Pennsylvania Railroad daily distribution sheets?

A. I did.

Q. Did you make up this statement from the distribution sheets?

A. Yes, sir; from the distribution sheet of the Tyrone Division of the Pennsylvania Railroad.

Q. Tyrone Division, and for distribution in the Clearfield region?

A. Yes, sir.

Q. Did Mr. Wigton go over that statement with you?
A. Under his direction this statement was made up.
Q. Is that the correct transcript or correct summary of what appears under those months on the distribution sheets of the Pennsylvania Railroad Company?
A. It is all the cars that were placed in that region.
Q. And the distribution thereof as to the Berwind & White Coal Mining Company and the Morrisdale Coal Company?
A. Yes, sir.

Cross-examination.

By Mr. GOWEN:

Q. The distribution sheets of the Pennsylvania Railroad Company which you examined show the character of cars placed daily at each mine in the region, did it not?
106 A. Yes.
Q. When I speak of the character of the cars, I refer to the fuel cars, the individual cars, the system cars, so called—that is, the Pennsylvania Railroad cars—and the foreign cars?
A. I merely took off——
Q. The sheets do show those cars separately?
A. Yes, the Pennsylvania Railroad sheets do, yes.
Q. And in order to arrive at the total number of cars placed at any one mine and in any given period, you have to take off the totals of each column, have you not, showing the foreign, the system, the individual and the fuel cars?
A. Yes. I took off what were the steel cars and what were the other cars in that region—for that certain period; one steel car equivalent to two wooden cars.

Redirect examination.

By Mr. GLASGOW:

Q. There is a column on there showing the total number of cars in the field on any particular date, whether they are steel cars or whether they are wooden cars?
A. Yes; the total cars in the region—wooden cars.
Q. There appears a column showing the total cars in the region on that day?
A. Yes.
Q. The total as shown on that sheet is what you took?
A. Yes, sir.
Q. You did not undertake to take the items from which that was made, whether they were fuel, individual or other cars?
A. I did not.
Q. You took the total shown on the sheet?
A. That is right.

Plaintiff closes.

107 *Defendant's Evidence.*

WALTER V. BUCK, having been duly sworn, was examined as follows:

By Mr. GOWEN:

Q. Where do you reside?
A. Philadelphia.
Q. What is your business?
A. Manager of the Audit Company of New York.
Q. You are the Philadelphia manager of the Audit Company of New York?
A. Yes, sir.
Q. Have certain statements been prepared under your supervision made up from the car distribution sheets of the Pennsylvania Railroad Company?
A. Yes, sir.
Q. Is the statement which I show you, which is headed, "The Audit Company of New York, the Pennsylvania Railroad Company, Exhibit A, based upon mine capacity," and containing columns in it, "Morrisdale Coal Company," and "Tyrone Region," one of the papers that was prepared under your direction?
A. It is.

Cross-examination.

By Mr. GLASGOW:

Q. Did you examine the sheets of the Pennsylvania Railroad Company yourself?
A. In a general way, yes; all under my direction.
Q. I am talking about what you did. Did you examine those sheets in detail yourself?
A. I do not know what you mean by detail. I went over them all.

DENNIS C. LYONS, having been duly sworn, was examined as follows:

By Mr. GOWEN:

Q. Where do you reside?
108 A. Philadelphia.
Q. Are you employed by the Audit Company of New York?
A. Yes, sir.
Q. I show you the statement which I have just referred to, and ask you whether the figures embraced in that statement were made up by you from the figures shown on the car distribution sheets of the Pennsylvania Railroad Company which were submitted to you?
A. They were.
Q. And are these figures correct compilations of the figures shown in those sheets?
A. They are, to the best of my knowledge.

Cross-examination.

By Mr. GLASGOW:

Q. Where did you make this examination?

A. In our own offices. We had the distribution sheets in the office, and compiled the statement from them. They are an exact copy of the distribution sheets—of the information shown in the distribution sheets.

Q. Are you the gentleman to whom Mr. Mentz applied to go over and *and* compare your statement on those sheets with his?

A. I do not know that.

Q. Did you see the statement that was prepared by Mr. Mentz, of the Morrisdale Coal Company, of the number of cars in that field for distribution during this period?

A. Made by the Morrisdale Coal Company? No; I have not seen that.

Q. There is a difference between the two statements, and I want to see wherein the difference occurs. Take the month of June, 1902, and the distribution sheet for that month. Now I have gone
109 over with you the daily number of cars in the region during the month of June, 1902, as shown by the distribution sheets now in court?

A. Yes, sir.

Q. And by the distribution sheets, counting one steel car as equal to two wooden cars, it appears that there were in the field during the month of June, 1902 7,793 cars, does it not?

A. We show 7,590.

Q. The sheets show that?

A. Yes.

Q. You have it down as 7,590 on your statement?

A. Yes, sir.

Q. Can you explain why there is a difference?

A. I cannot explain right away. If we had the papers from which we prepared this report, I could very easily explain it. This report of ours is absolutely correct. We have verified it.

Q. So are the sheets correct—the distribution sheets.

A. We cannot account for that 203 cars without the original papers. We could not explain that right away.

Q. But the distribution sheets show 7,793, do they not?

A. Yes, they show that.

Mr. GLASGOW: I will have to go over it by months, unless counsel will agree——

Mr. JOHNSON: We have had our expert to make up the set of figures, and we stand by them.

By Mr. GLASGOW:

Q. Take the sheet for July, 1902, the distribution sheet for that month. There appear to have been in the region on the 1st day of July, 1902, 58 steel cars and 263 wooden cars, isn't that so?

A. 58 and 263, that is right.

110 Q. The 2nd day of July, 44 steel, 267 wooden, isn't it
A. Yes.
Q. On the 3rd of July, 40 steel, 158 wooden?
A. Right.
Q. On the 4th, 13 steel, 274 wooden?
A. Right.
Q. The next day, 78 steel, 241 wooden?
A. Right.
Q. The next day, 22 steel, 256 wooden?
A. Right.
Q. The next day, 54 steel, 227 wooden?
A. That is right.
Q. July 10, 11 steel, 182 wooden?
A. Right.
Q. July 11, 13 steel, 225 wooden?
A. Right.
Q. On the 12th, 4 steel, 154 wooden?
A. Right.
Q. July 14, 74 steel, 380 wooden?
A. Yes, sir.
Q. On the 15th, 64 steel, 147 wooden?
A. Yes, sir.
Q. On the 16th, 3 steel, 199 wooden?
A. Right.
Q. On the 17th, 5 steel, 151 wooden?
A. Right.
Q. On the 18th, 7 steel, 176 wooden?
A. Right.
Q. On the 19th, steel cars, 1, 175 wooden?
A. Right.
Q. On the 21st of July, 118 steel, 301 wooden?
A. Right.
Q. On the 22nd of July, 54 steel, 184 wooden?
A. Right.
Q. On the 23rd of July, 4 steel, 235 wooden?
A. Right.
Q. On the 24th, 31 steel, 180 wooden?
111 A. Right.
Q. On the 25th, 32 steel, 241 wooden?
A. Right.
Q. On the 26th, 1 steel, 214 wooden?
A. Right.
Q. On the 28th, 72 steel, 261 wooden?
A. Right.
Q. On the 29th, 67 steel, 210 wooden?
A. Right.
Q. On the 30th, no steel, 201 wooden?
A. Right.
Q. On the 31st, 64 steel, 214 wooden?
A. Right.

Q. Add that up, please, and let me know, counting one steel car to two wooden cars, how many there were in the field?
A. 7,584.
Q. How many do you make it on your statement?
A. 7,590.
Q. What is it for June?
A. 7,387; a difference of 197.
Q. How do you explain your sheet?
A. There is no use in trying to explain it, without a little time to look over our figures.
Q. I am asking you to explain the difference between your figures and the distribution sheets.
A. I cannot explain it by my papers. I cannot explain it until we get our original draft papers?
Q. Where are they?
A. In our office.
Q. Where is that?
A. In the Arcade Building.
Q. Take the next month.
A. We can explain all those differences.
Q. Take the next month.

The COURT: You had better withdraw the witness until we have those papers.

112 By Mr. GOWEN:

Q. Was that paper prepared by you?
A. Yes, sir.
Q. From the distribution sheets of the railroad company?
A. Yes, sir.

By Mr. GLASGOW:

Q. Is that statement based upon this (indicating)?
A. This is an exact copy of the records of the distribution sheets.
Q. Is that based upon this statement "A"?
A. This is an exact copy of the distribution sheets.
Q. You said that "A" was. Is that statement based on the figures as shown in your statement "A."
A. Let me see that.

(Statement marked Exhibit A shown witness.)

A. Yes.
Q. This is a statement which shows, as I understand it, the total number of cars placed in the mines in the Tyrone region during the years 1902, 1903, 1904 and 1905, and the distribution of those cars as between the individual cars, the company coal cars, the system cars and the foreign cars and the box cars?
A. Yes, sir.
Q. Taking the year 1902, what was the total number of cars placed at the mines in the Tyrone region?
A. 83,943.

Q. Of those 83,943 how many were individual cars?
A. 14,221.
Q. How many cars were Pennsylvania Railroad fuel cars?
A. 16,119.
Q. How many were what is called system cars, by which is meant, I understand, Pennsylvania Railroad cars intended for commercial shipment?
A. 31,048.
113 Q. How many were foreign railroad cars?
A. 22,544.
Q. How many box?
A. 11.
Q. For the year 1903 what was the total number of cars placed?
A. 81,279.
Q. Of those how many were individual?
A. 20,483.
Q. And how many were Pennsylvania Railroad fuel?
A. 15,614.
Q. How many were Pennsylvania Railroad system cars?
A. 20,947.
Q. How many were foreign railroad cars?
A. 24,222.
Q. And how many box cars?
A. 13.
Q. For the year 1904 what was the total number placed?
A. 64,650.
Q. Of those how many were individual?
A. 16,705.
Q. Company's fuel cars?
A. 11,477.
Q. Pennsylvania Railroad system?
A. 21,888.
Q. How many foreign?
A. 14,508.
Q. Box cars?
A. 12.
Q. For the year 1905 how many were placed?
A. 80,213.
Q. Of those how many were individual?
A. 26,716.
Q. How many company fuel?
A. 22,812.
114 Q. How many Pennsylvania Railroad system?
A. 24,769.
Q. How many were foreign?
A. 5,542.

Mr. GLASGOW: I reserve my cross-examination at this point until this other statement is taken up.

Mr. GOWEN: We offer in evidence this statement, marked Exhibit A.

The said statement is admitted in evidence, subject to the objection and cross-examination by counsel for plaintiff, marked Defendant's Exhibit A, and is as follows:

The Pennsylvania Railroad Company.

EXHIBIT A.

Based Upon Mine Capacity.

1902.	Morrisdale Coal Company. Rating in cars.	Total cars placed.	Percentage.	Tyrone region (with Snow Shoe region eliminated.) Rating in cars.	Total cars placed.	Percentage.
January	783	513	66.5	17,069	6,685	39.1
February	696	599	86.1	16,370	5,458	33.3
March	754	461	61.1	18,268	5,933	32.4
April	754	590	78.2	18,455	6,814	36.9
May	793	533	67.2	19,225	7,956	41.3
June	850	251	29.5	17,433	7,590	43.5
July	884	294	33.3	18,153	7,387	40.6
August	884	333	37.7	18,304	7,776	42.4
September	941	218	23.2	18,475	6,642	35.9
October	999	269	26.9	19,409	7,666	39.4
November	925	233	25.2	18,043	6,814	37.7
December	962	219	22.8	18,872	7,222	38.2
Total	10,225	4,513	44.1	218,076	83,943	38.4

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1903.	Morrisdale Coal Company. Rating in cars.	Total cars placed.	Percentage.	Tyrone region (with Snow Shoe region eliminated.) Rating in cars.	Total cars placed.	Percentage.
January	999	338	33.8	19,905	6,747	33.8
February	888	367	41.3	17,758	6,363	35.8
March	962	373	38.8	19,266	7,824	40.6
April	912	198	21.7	18,716	6,171	32.9
May	832	343	41.2	17,836	7,574	42.4
June	832	329	39.5	17,836	6,546	36.7
July	832	438	52.6	18,027	6,891	38.2
August	832	381	45.8	18,209	6,332	34.7
September	800	349	43.6	17,525	6,355	36.2
October	864	325	37.6	18,927	6,917	36.5
November	724	291	40.2	16,824	6,335	37.6
December	728	329	45.2	18,232	7,224	39.6
Total	10,205	4,061	39.8	219,061	81,279	37.1

1904.						
January	728	282	38.7	18,226	5,477	30.
February	700	328	46.9	17,557	4,900	27.9
March	756	296	39.1	19,103	6,375	33.3
April	728	303	41.6	18,434	5,718	31.
May	700	359	51.3	17,725	5,730	32.3
June	728	383	52.6	18,460	4,563	24.7
July	1,000	195	19.5	18,125	4,123	22.7
August	1,080	147	13.6	19,689	4,850	24.6
September	1,000	88	8.8	18,179	4,817	26.4
October	1,040	160	15.4	19,545	5,553	28.4
November	1,000	516	51.6	19,564	6,039	30.8
December	1,040	282	27.1	20,548	6,505	31.6
Total	10,500	3,339	31.8	225,155	64,650	28.7

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	Morrisdale Coal Company.			Tyrone region (with Snow Shoe region eliminated.)		
1905.	Rating in cars.	Total cars placed.	Percentage.	Rating in cars.	Total cars placed.	Percentage.
January	1,040	259	24.9	20,740	5,617	27.
February	960	396	41.3	19,194	5,831	30.3
March	1,124	527	46.9	22,314	7,158	32.
April	1,100	461	41.9	20,750	6,166	29.7
May	1,144	450	39.3	21,580	6,180	28.6
June	1,144	338	29.5	21,580	5,908	27.3
July	1,200	360	30.0	21,550	6,045	28.
August	1,296	330	25.5	23,286	5,952	25.5
September	1,200	359	29.9	21,620	7,263	33.5
October	1,248	396	31.7	22,568	8,486	37.6
November	1,094	454½	41.5	17,204	7,939	46.1
December	925	416½	45.0	12,051	7,671	63.6
Total	13,475	4,747	35.2	244,437	80,214	32.8
Total for 4 yrs	44,405	16,660	37.5	906,729	310,086	34.1

By Mr. GOWEN:

Q. I show you another statement and ask you whether that was prepared by you?
A. Yes, sir.

The said statement is offered in evidence by counsel for defendant, marked Defendant's Exhibit B; is admitted subject to the objection and cross-examination by counsel for plaintiff, and is as follows:

117 The Pennsylvania Railroad Company.

Statement of Cars Placed at Bituminous Coal Mines in Tyrone Region.

Pennsylvania Railroad Lines East of Pittsburg and Erie.

	Individual.	Company coal.	System.	Commercial.		
				For'gn.	Box.	Total.
1902 Cars placed	14,221	16,119	31,048	22,544	11	83,943
1903 Cars placed	20,483	15,614	20,947	24,222	13	81,279
1904 Cars placed	16,705	11,477	21,888	14,568	12	64,650
1905 Cars placed	26,716	22,812	24,769	5,542	374	80,213
Total	78,125	66,022	98,652	66,876	410	310,085

By Mr. GOWEN:

Q. This statement, I understand, shows in the first column under the head of "Rating in Cars," the total rating in cars at the mines in the Tyrone region? I am now referring to a third statement which I show you, and which is marked "Defendant's Exhibit C."

A. Yes, sir.

Q. During the months covered by the statement?

A. Yes, eight months, from September, 1902, to April, 1903.

Q. Both inclusive?

A. Both inclusive.

Q. Then it shows, in the second column, the total cars placed in the region?

A. Yes, sir.

Q. During those eight months?

A. Yes, sir.

Q. Then it shows, in the third column, the percentage which the cars placed bore to the total car rating during those months?

118 A. Yes, sir.

Q. In the last column, under the head of "Cars placed less fuel and individual cars in region," it gives the cars placed in each month in this period other than fuel and individual cars?

A. Yes, sir.

Counsel for defendant offers in evidence the last mentioned paper, marked Defendant's Exhibit C.

Paper admitted subject to the objection and cross-examination of counsel for plaintiff.

The said paper, Defendant's Exhibit C, is as follows:

The Pennsylvania Railroad Company.

Tyrone Region.

(With Snow Shoe Region Eliminated.)

1902.	Rating in cars.	Total cars placed.	Percentage.	Cars placed, less fuel and individual, in region.
Sept.	18,475	6,642	35.9	1,862
Oct.	19,409	7,666	39.4	2,091
Nov.	18,043	6,814	37.7	812
Dec.	18,872	7,222	38.2	733
1903.				
Jan'y	19,905	6,747	33.8	559
Feb'y	17,758	6,363	35.8	452
Mar.	19,266	7,824	40.6	1,381
Apr.	18,716	6,171	32.9	1,371
Total ..	150,444	55,449	36.9	9,261

Evidence closed.

119 *Charge of the Court.*

McPHERSON, *J.*:

GENTLEMEN OF THE JURY: You will probably be relieved to know that you will not have anything more than a formal duty to perform in this case. As you will have observed, it presents some rather intricate and difficult questions growing out of the inevitable conflict of the set of facts that have been presented here. I think it would be scarcely possible for you to do justice to this case, for reasons which will present themselves to your minds as well as to mine. The parties have fortunately relieved you from any difficulty by agreeing that you may render a special verdict. I will therefore ask you to render a special verdict in this form:

We find as a fact that the amount of the plaintiff's claim is correct and is contained in its Exhibit 2, and is:

Principal, $51,640.60;

Interest, 15,515.49;

Total, $67,156.09.

Said amount being ascertained in the way and manner in said exhibit set forth, together with the evidence explaining and referring to the same.

If the Court should be of opinion that the questions of law involved in the case are, in whole or in part, with the plaintiff, judgment may be entered for the above amount or for such smaller sum as, in the opinion of the Court, the plaintiff may be entitled to recover.

If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant. Are you content to render such a verdict?

The JURY: Yes, your Honor.

The points of the plaintiff and defendant respectively are
120 not answered specifically, and to such failure to answer the points specifically an exception is sealed both to plaintiff and defendant.

Said points are as follows:

Plaintiff's Points.

1. In periods of car shortage in the Clearfield Region of the Pennsylvania Railroad, that is, when the Pennsylvania Railroad Company could not furnish all the cars required for the shipment of coal, by the coal operators or miners in the Clearfield Region, it was the duty of the Pennsylvania Railroad Company to distribute all the cars available for shipment of coal, among the shippers making requests for cars in accordance with the percentage system of distribution in effect at the time, and in making such daily distribution all the cars in the Clearfield Region available for the shipment of coal should have been counted, and the plaintiff was entitled each day to have assigned to its use the number of cars which its percentage of all such available cars, would award to it in accordance with the system of distribution in effect.

2. If the jury should find that the Pennsylvania Railroad Company failed to furnish to the plaintiff during the period covered by the complaint in this case, the cars to which it was entitled under its percentage for car distribution and that during the same period the defendant furnished to another shipper the full number of cars to which such other shipper was entitled under its percentage, or furnished to such other shipper more cars than it was entitled as aforesaid, then the Court charges the jury that this action of the defendant subjected the plaintiff to undue or unreasonable prejudice or disadvantage, and thereby the defendant made or gave undue or unreasonable preference or advantage to such other shipper, and the plaintiff is entitled to recover such damages as it may show that it suffered by reason of such action of the defendant.

121 The damages should be estimated as follows:

The jury should first determine the difference in tonnage between the number of cars actually given to the plaintiff in any one month, and the number to which it was actually entitled, considering all the cars actually in the Clearfield Region.

This difference in tonnage should be multiplied by the difference between the average cost to the plaintiff during that month for mining a ton of coal, and the average price per ton at which the plaintiff was compelled to purchase coal in the open market for the purpose of enabling it to fill its contracts of shipment. The result thus obtained, with interest thereon from the respective months in which damages have accrued, is the damage to which the plaintiff is entitled.

Defendant's Points.

First Point. It was the duty of the defendant to place at the mines of the owners thereof all individual cars so-called; that is, cars which were the property of any of its operators, and this duty it was bound to perform regardless of the question whether by so doing it gave to such operators a larger proportionate share of cars than it was able to give on the same day to other operators.

Second Point. It was the duty of the defendant to place at the mines of those operators to whom such cars were consigned all foreign railroad cars which were received by it to be placed at such mines in order that these cars might be loaded with fuel coal for the companies owning such cars, and this without regard to the consideration whether or not by so doing these operators received a larger proportionate number of cars than did the other operators in the region.

Third Point. The defendant had a right to place cars to be loaded with fuel for its own use at the mines from which it was drawing its supply coal, even though by so doing these mines
122 received a larger proportionate number of cars than the other mines in the region.

Fourth Point. The burden is upon the plaintiff to show that the defendant failed to deliver to it its proportion of the cars subject to distribution or allotment among the shippers of coal in the Tyrone region. As the plaintiff has not established this, it is not entitled to recover, and your verdict should be for the defendant.

Fifth Point. There is no evidence under which the jury can find that during the entire period of the action; that is, from March, 1902, to December, 1905, both inclusive, the plaintiff did not receive its full proportion of the cars placed at the mines in the Tyrone region, and as the burden was upon it to show this fact, it is not entitled to recover, and your veridct should be for the defendant.

Sixth Point. The plaintiff was only entitled to its proportion of the cars belonging to the defendant and controlled by it, exclusive of cars used for the movement of its own fuel sent into the Clearfield region. It is its duty to supply you with evidence of what was the number of cars so sent and that it received less than its proportion thereof.

Seventh Point. Even though you could find from adequate evidence that the plaintiff received less than its proportion of such cars so sent, it is not entitled to recover the difference between the cost to it of the coal representing the deficiency and what it paid for such coal sold by it to others.

which was all the evidence offered by both the plaintiff and the defendant, to the admission of parts of which said evidence exceptions were allowed to the plaintiff, as set forth in the stenographer's transcript of evidence above, and thereupon the Court charged the jury as follows (Prout, Charge of Court, see page 119);
123 and in accordance with the said charge the jury did render the special verdict as instructed by the Court and embodied

in said charge, and thereupon the counsel*f* for the said plaintiff did then and there except to the admission of parts of said evidence, as set forth above, and did also except to the Court's refusal to answer specifically the points submitted by the said plaintiff, as set forth in the stenographer's transcript of said charge and opinion as above; and the plaintiff thereafter having moved the Court to enter judgment in its favor upon the said special verdict, by motion in writing duly filed, as follows: "And now, to wit, this 29th day of November, 1909, the plaintiff in the above case, the Morrisdale Coal Company, through its attorneys, Chester N. Farr, Jr., and William A. Glasgow, Jr., moves that judgment be entered in favor of the plaintiff against the defendant on the special verdict entered in the sum of Sixty-seven thousand, one hundred fifty-six dollars and nine cents ($67,156.09)," and the said defendant, on the 31st day of January, 1910, having moved the Court to dismiss the plaintiff's case on the ground that the Court had no jurisdiction thereof, and the Court having granted said motion, as appears by the record, and the plaintiff having excepted to the granting of said motion, and inasmuch as said charge and opinion, and the evidence and exceptions thereto so excepted to, did not appear upon the record, the said counsel for the said plaintiff did then and there tender this, its bill of exceptions to the rulings of the Court, to which exceptions were granted to the plaintiff as set forth above, and to the opinion and charge of the Court, and to the action of the Court in granting the motion to dismiss plaintiff's case for want of jurisdiction, and counsel for the plaintiff further requested that the seal of the Court, aforesaid, should be put to the same, according to the form of the statute in such case made and provided, and thereupon the aforesaid Judge, at the request of the said
124 counsel for the said plaintiff, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 10th day of February, A. D. 1910.

JOHN B. McPHERSON, *Judge.* [SEAL.]

(Endorsed: In the Circuit Court of the United States, Eastern District of Pennsylvania. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Bill of Exceptions. Presented Feb. 9-10. J. B. McP. Agreed to. J. G. Johnson, Att'y for Def't. Filed Feb. 10, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Motion for Judgment on Behalf of Plaintiff.

And now, to wit, this 29th day of November, 1909, the plaintiff in the above case, the Morrisdale Coal Company, through its attorneys, Chester N. Farr, Jr., and William A. Glasgow, Jr., moves that judgment be entered in favor of the plaintiff against the defendant on the special verdict entered in the sum of Sixty-
125 seven thousand one hundred fifty-six dollars and nine cents ($67,156.09).

Respectfully submitted,

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Pro Plaintiff.

(Endorsed: C. C. of U. S. for E. D. of Pa. April Sessions, 1908. No. 102. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Motion for Judgment on Behalf of Plaintiff. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., pro plaintiff. Filed Nov. 29, 1909. Henry B. Robb, Clerk. By L., Deputy Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

And now, this thirty-first day of January, 1910, defendant moves the Court to dismiss this action for want of jurisdiction to entertain the same.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Defendant.

(Endorsed: No. 102. April Sessions, 1908. Circuit Court of the U. S. Eastern Dist. of Penna. Morrisdale Coal Company vs. Pennsylvania Railroad Co. Motion to dismiss for want of jurisdiction. Francis I. Gowen, John G. Johnson, for defendant. Filed Jan. 31, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

126 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Motion to Dismiss for Want of Jurisdiction.

McPHERSON, *District Judge:*

This suit was brought to recover damages from the Pennsylvania Railroad Company for a practice that is alleged to be in violation of the Act to regulate commerce. The plaintiff's coal mine is in the Clearfield region of this state, and the defendant carries much of the product in commerce between the states. The practice complained of was a method of distributing coal cars among the mines of the region at times when the supply of cars fell short. The plaintiff averred that an undue preference was given thereby to other miners and shippers in the same region, while it was obliged to bear an unreasonable burden. This being forbidden by section 3, the plaintiff sued to enforce the liability referred to in section 8, and claims the right to recover, in spite of the conceded fact that no complaint was made in the first instance to the Interstate Commerce Commission. The suit is said to be brought under the permission given by section 9; a trial was had before a jury, and a special verdict was rendered in favor of the plaintiff. The right to judgment,
127 however, was still undetermined when the present motion was made; and this right was believed at the trial to depend upon the decision of certain questions that are referred to in the verdict. Among these, it was a vital question whether the method that was followed by the railroad company during the years 1902-1905 for distributing its available supply of cars during periods of shortage imposed unreasonable disadvantage upon the plaintiff, or gave unreasonable preference to its competitors in the Clearfield region. Briefly, the method was this: The railroad company determined the capacity of the various mines in the region by a computation that is not complained of, and thus arrived at the proportion of cars to which the plaintiff and other miners would be entitled when cars were too few to meet the demand completely. This proportion was applied to the deficient car supply in the following manner; Each day the total number of cars available for the whole region was ascertained by the railroad company, and a distribution sheet was then made up, allotting to the plaintiff and the other miners the cars to which the defendant's method of distribution showed them to be entitled. The total available cars consisted of four classes; those that belonged to private individuals or corporations; those that were to be filled with coal that the railroad company had bought for its own use as fuel; those that belonged to foreign

railroad companies, and were also to be filled with coal that these companies had bought for their own use as fuel; and system, or company, cars—meaning such cars as did not belong to either of the first three classes but were available generally for the carriage of coal. If the railroad company had distributed the total number of these four classes ratably among the mines according to capacity, the plaintiff would not be now complaining. But a different method was pursued. From the total number of available cars the defendant deducted the aggregate of the first three classes—assigning the private cars to the individuals or corporations who owned
128 them or were entitled to use them, and assigning its own fuel cars and the fuel cars of foreign railroads to the mines from which the supply was to come—and distributed the fourth class alone in proportion to capacity. The result was, that the owners or users of private cars received these cars, and also their ratable proportion of the fourth class; and the miners who had contracted to fill the fuel cars, either of the defendant or of foreign railroad companies, received these cars, and also their ratable proportion of the fourth class while the plaintiff received only its ratable proportion of the fourth class, and was thus confined to a supply that was necessarily smaller than if its proportion had been allotted out of the total of the four classes. Averring injury by this method of distribution, and asserting that the total number of the four classes without any deduction should have been divided among the mines of the region in proportion to their ascertained capacity, the plaintiff sought to recover damages in this action for unlawful discrimination.

It will at once be observed that the suit requires a court and jury to decide whether the defendant's method of distribution offended against the Act. The questions are, (1) whether this method gave a preference to any particular person, company, firm or corporation, or subjected the plaintiff to any prejudice or disadvantage; and (2) if such preference or disadvantage existed, whether it was undue or unreasonable. These are stions of fact, and manifestly cannot be decided merely by considering what methods may have been held to be lawful, when adopted and applied by other railroads under other circumstances. There is no "rule of law," that requires the aggregate of available cars always and everywhere to be divided ratably in times of shortage. Even if it be conceded, that whenever a dispute upon the subject has been presented to a court or to the Commission, this method of distribution has usually been de-
129 cided to be the fairest, it does not follow necessarily that the method is to be applied in the next dispute that arises. It is perhaps more nearly correct to speak of the "rule" as similar to a working hypothesis. It may do to start with, if, or since, it represents a fairly general opinion concerning what is just and equitable; but the circumstances of a given case may require the rule to be modified, and would certainly require it to be modified, if, instead of avoiding, it would cause, an undue preference or disadvantage. What is undue or unreasonable is ordinarily a pure question of fact; and, where such a question is presented, it is necessary to be cautious in applying a rule that may have been properly used to decide a

similar question, but under different circumstances. And, since the question is of fact, there will always be the danger that different courts and juries may reach different conclusions, even when the evidence and the facts are essentially the same. Different minds occupy different points of view, and may therefore see the same question from opposite angles with varying results. Moreover, as a question of fact can only be resolved by evidence, it may easily happen that the quantity or quality of evidence may differ in one trial from another, so that recovery by one plaintiff and failure by another may both be just—one having evidence enough, while the other has too little, to support a verdict.

These remarks may perhaps serve as a preface to the examination of two or three recent decisions of the supreme court, which deal with some of the difficulties that beset the effort to apply section 3 by the piecemeal procedure of unconnected trials before a court and jury. Facing these difficulties, and influenced no doubt by other considerations as well, the court has, I think, announced important conclusions upon the construction of the Act; and it is therefore necessary to examine carefully the decisions referred to, and to note the course of reasoning by which they have been
130 reached. The first is Texas & Pacific Railway Company vs. Abilene Cotton Oil Co., 204 U. S. 426. This has to do with an unreasonable rate, but much that is said by the court is also applicable to a dispute like this, where the injury is charged to an unreasonable practice. The oil company was compelled to pay a rate which it believed to be more than was reasonable, and the suit was brought to recover the excess. The action was at common law in a court of the state, and the railway defended, inter alia, by averring, and afterwards proving, that the shipment was inter-state, and that the rate complained of had been established and posted as required by the Act to regulate commerce. Nevertheless, the Texas court of civil appeals decided, that, as the rate had been found by the trial court to be unreasonable, the oil company had a right to recover under the principles of the common law, altho the rate had been established by the carrier under the federal statute. In other words, the state court entertained a suit, the purpose of which was to pronounce a rate unreasonable, in spite of the fact that the rate had been established and posted under the provisions of the Act, and in spite also of the fact that the reasonableness of the rate had not been passed upon by the Commission. A question was thus presented which the supreme court states in the following language (p. 436):

The fundamental question is "the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, altho the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the Act to regulate commerce, and which it was the duty of the carrier, under the law, to enforce as against shippers."

The court conceded that a shipper might recover
131 damages at common law if the carrier charged an unreasonable rate, and that such damages might properly be measured

by the excess above a proper rate. And it is further conceded that the oil company was clearly suing upon a right that was valid at common law, and that the Act to regulate commerce had not expressly taken the right away. But it was held that the right was nevertheless taken away impliedly, altho the court agreed that repeals by implication are not favored, and that a statute should not be construed to take away a common law right unless such a result is imperatively required. This ruling in favor of the implied repeal is supported by showing that the Act provides complete machinery for the protection of shippers, and has substituted its own remedies for the remedies of the common law. To sustain this position, the court summarizes the statute as follows:

"The Act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the Act and the punishments which it imposed were directed not only against carriers but against shippers, or any persons who, directly or indirectly, by any machination or device, in any manner whatever, accomplished the result of producing the wrongful discriminations or preferences which the Act forbade. It was made the duty of carriers subject to the Act to file with the Interstate Commerce Commission created by that Act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was en-
132 dowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the Act. To that end it was made the duty of the district attorneys of the United States, under the direction of the attorney general, to prosecute proceedings commenced by the Commission to enforce compliance with the Act. The Act specially provided that whenever any common carrier subject to its provisions 'shall do, cause to be done, or permit to be done, any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons thereby injured for the full amount of damages sustained in consequence of any such violation of the provisions of this Act * * *' Power was conferred upon the Commission to hear complaints concerning violations of the Act, to investigate the same, and, if the complaints were well-founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out

in the statute, prima facie effect in such courts being given to the findings of fact made by the Commission."

Pointing out that the Act was undoubtedly intended to redress the wrongs resulting from unjust discrimination and undue preference in regard to rates, and that the object was to be accomplished by compelling the carrier to establish schedules of reasonable rates that should apply uniformly to all, and should not be departed
133 from until the schedule was changed in the manner provided by the Act, the court goes on to say:

"When the general scope of the Act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute, and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the Act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the commission, would give rise to a change of the schedule rate, and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the Act and the remedial provisions which it created, which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established
134 rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discriminations, and afford, moreover, a ready means

by which, through collusive proceedings, the wrongs which the st
was intended to remedy could be successfully inflicted. Indeed
reason can be perceived for the enactment of the provision endo
the administrative tribunal which the Act created with power, on
proof, not only to reward reparation to a particular shipper, bu
command the carrier to desist from violation of the Act in the fu
thus compelling the alteration of the old or the filing of a new sc
ule, conformably to the action of the commission, if the power
left in the courts to grant relief on complaint of any shipper, upo
theory that the established rate could be disregarded and be tre
as unreasonable, without reference to previous action by the Com
sion in the premises. This must be, because, if the power exi
in both courts and the Commission to originally hear complaint
this subject, there might be a divergence between the action of
Commission and the decision of a court. In other words, the es
lished schedule might be found reasonable by the Commis
135 in the first instance and unreasonable by a court acting
inally, and thus a conflict would arise which would re
the enforcement of the Act impossible."

But, as the argument had been made that section 9 permits an
jured shipper either to complain to the Commission, or to sue at
merely compelling him to elect which remedy he will adopt, and
the suit under review had been brought in the exercise of such
tion, the court replied to this contention in the following signifi
language:

"Nor is there merit in the contention that sec. 9 of the Act com
to the conclusion that it was the purpose of Congress to confer po
upon courts primarily to relieve from the duty of enforcing the es
lished rate by finding that the same as to a particular perso
corporation was so unreasonable as to justify an award of dama
True it is that the general terms of the section, when taken al
might sanction such a conclusion, but, when the provision of
section is read in connection with the context of the Act, and in
light of the considerations which we have enumerated, we think
broad construction contended for is not admissible. And this
comes particularly cogent when it is observed that the power of
courts to award damages to those claiming to have been injured
provided in the section, contemplates only a decree in favor of
individual complainant, redressing the particular wrong asserte
have been done, and does not embrace the power to direct the car
to abstain in the future from similar violations of the Act; in ot
words, to command a correction of the established schedules, wh
power, as we have shown, is conferred by the Act upon the Comm
sion in expressed terms. In other words, we think that it inevita
follows from the context of the Act that the independent right of
individual originally to maintain actions in courts to obt
136 pecuniary redress for violations of the Act, conferred by
9th section, must be confined to redress of such wrongs as c
consistently with the context of the Act, be redressed by cou
without previous action by the Commission, and, therefore, does
imply the power in a court to primarily hear complaints concern

wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily, or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

Several decisions are then reviewed—especially Railway vs. Hefley, 158 U. S. 98, and Railway vs. Mugg, 202 U. S. 242—and the court continues (p. 445):

"In view of the binding effect of the established rates upon both the carrier and shipper, as expounded by the two decisions of this court just referred to, the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement"—that is, as I understand it, an agreement to charge a rate different from the rate contained in its published schedule—"when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in a Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established
137 schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon, on the complaint of an individual, to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of rates which it was the object of the statute to secure, and, on the other, from enforcing that equality which the statute commands."

It is then declared that section 22, which preserves the "remedies now existing at common law or by statute," cannot in reason be construed as preserving to a shipper a common law right which would be absolutely inconsistent with the statute:

"In other words, the Act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the Act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative, when other

appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the Act."

And the conclusion of the whole matter is thus stated on page 448:

* * * "A shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the Act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable." * * *

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This decision deals specifically with the subject of rates, but Baltimore & Ohio Railroad Company vs. United States ex rel. Pitcairn Coal Co. has to do with the subject now in hand—the distribution of coal cars in time of shortage. The decision was rendered on January 10, 1910, and the opinion is written by Mr. Justice White, who also spoke for the court in the case of the Abilene Oil Co. The suit was begun in the United States circuit court for the district of Maryland by a petition for a mandamus. The writ was asked for by the Pitcairn Coal Co. (apparently joined afterwards by other petitioners) in order to compel the Baltimore & Ohio Railroad Co. to change its method of distributing coal cars among certain mines that were served by the railroad. It is unnecessary to describe the method in detail. It differed in several particulars from the method now complained of, but it was alleged to produce a similar effect, namely, an undue preference in favor of certain miners and shippers, and an undue discrimination against others. The railroad company denied the averments of preference and discrimination, and asserted the validity of its method and rules of distribution. The issue thus formed required an elaborate and prolonged inquiry into the facts, and in the end the circuit court made an order sustaining the railroad's method except in one particular—the company was decided to be wrong in deducting private cars before the pro rata distribution was made. The court of appeals went further and decided that the railroad company's method was also wrong in several other particulars—inter alia, in deducting its own fuel cars and the fuel cars of foreign railroads before making pro rata distribution to the mines in the district. The grievance of the Pitcairn Co. had not been laid before the Commission, and the situation presented to the supreme court by all these facts is referred to in the following paragraphs from the opinion:

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"One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the Act to regulate commerce, there was power under the circumstances disclosed by the record to consider the subject matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such, that, even without the assigned error to which we have referred, the question at the very threshold necessarily arises and commands our attention as to whether there was power in the courts, under the circumstances disclosed by the record, to grant the

relief prayed consistently with the provisions of the Act to regulate commerce, and to that subject we therefore at once come.

"To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve the acts of the Baltimore & Ohio Railroad, regulations adopted by that company and alleged dealings by the other corporations, all of which, it is asserted, concern inter-state commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the Act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the
140 Act is sought and an order, by way of mandamus, was invoked, and was allowed which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of inter-state commerce in the future."

This being the situation and these being the questions, the court goes on to say:

"When the situation is thus defined, we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission, and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded, by a complaint made to it, the opportunity to exert its administrative functions."

The court declares that the controversy is controlled by the considerations that governed the decision in the case of the Abilene Oil Co.; and points out that the relief there prayed for was denied because it was inconsistent with the Act to regulate commerce—the inconsistency being found in the fact that the Act made the rate then in controversy of controlling force until it should be pronounced unreasonable by the Commission itself, on a complaint made to that body. Therefore the rate could not be declared unreasonable—either directly or inferentially—in a proceeding before another tribunal. Any other view would give rise to inextricable confusion, would create unjust preferences and undue discriminations, would frustrate the purposes of the Act, and in effect cause the Act to destroy itself.

But the Baltimore & Ohio Co.'s case arose in January, 1907, after the amendments of 1906 had been passed, and the court therefore proceeds to the consideration of these amendments, saying:

141 "The ruling there made (in the Abilene case) dealt with the provisions of the Act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the Act by that ruling; since, by section 15, as enacted by the

amendment of June 29, 1906, the Commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering section 15 in the case of Illinois Central Railroad Co. vs. Interstate Commerce Commission, just decided, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the Commission should be suspended or enjoined, were without power to invade the administrative functions vested in the Commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene case, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the Act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well-founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint.

142 The Commission finds from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail. If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body."

Illustrations of actual confusion growing out of rulings by the courts and rulings by the Commission upon the same subject are then given, and the opinion passes on to consider the effect of section 23, which provides for the remedy by mandamus. This is the section that had been invoked by the Pitcairn Co., and at first blush its language certainly seems to give the courts primary jurisdiction to issue the writ whenever a carrier violates the Act by preferential rates or practices. But the supreme court declared that the apparent scope of the section must obviously be restricted so that it may harmonize with the rest of the Act and not destroy one of its main purposes. Thus restricted, it does not give the remedy by mandamus primarily, but only (when the remedy is available at all) after the Commission has acted upon the complaint. To use the court's own language:

"As it was settled in the Abilene case that the right to question in the courts the rates established in accordance with the act to regulate commerce, without previous resort by complaint to the Commission in order to determine their unreasonableness, would be de-
143 structive of the Act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in section 23, which is here relied upon. But as we are required, for the determination of the case now before us, to consider the scope of the Act to regulate commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuasive force of the reasoning which constrained to the conclusion announced in the Abilene case. Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the Act to regulate commerce as to preferences and discriminations were far reaching, the mechanism provided by the statute for the enforcement of orders of the Commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the orders of the Commission, but the aid of judicial authority was required as a prerequisite for such result. Section 23, here relied upon, was not part of the original Act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of making the remedial processes of the Act more speedy and efficacious. Now, it cannot in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the Act by supplying efficient means for giving effect to the orders of the Commission made in the exertion of the authority conferred upon that body. To that end one of the amendments, section 15, gives operative effect to the orders of the Commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and unjustly discriminatory, to correct the same by its order, which order should have effect within the period fixed in the statute,
144 and, to enforce these provisions, penalties and forfeitures are provided. Sec. 16. It being demonstrable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of section 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require

a prerequisite exertion of power by that body, or to compelling performance of duties which plainly arise from the obligatory f which the statute attaches to orders of the Commission, rend within the lawful scope of its authority, until such orders are aside by the Commission or enjoined by the courts."

And the rulings in the Baltimore & Ohio Co.'s case are emp sized by another decision that was announced on the same day in opinion written by the same justice—Interstate Commerce Comm sion vs. Illinois Central Railroad Co. In that case a miner shipper of coal complained to the Commission that the railro method of distributing cars when the supply was short resulted preference and discrimination—especially because the company ducted private cars and foreign railway fuel cars before mak distribution to the mines along its road. The Commission was as

by the company to consider in the same proceeding the f
145 ther question whether its own fuel cars might be deduc
before distribution was made, and accordingly the Comm sion dealt with all of these three classes. Its order directed the co pany to give up the practice of deducting any of these classes bef making distribution, and (in the exercise of the power given by t amendments of 1906) directed the carrier to include all the availa cars in a total for ratable distribution, and to include them fo period of two years. The railroad company sought to enjoin t order, and the case was heard by three circuit judges of the seven circuit. They decided (173 Fed., 930) that the Commission w right in directing the company to include private cars and forei railway fuel cars in the total that were to be distributed ratably the mines, but was wrong in directing it to include its own fuel c in that number. The Commission appealed, and the supreme co sustained the appeal, deciding that the circuit court should not ha interfered with the order, so far as the company's own fuel cars w concerned. (The railroad did not appeal, and the other two clas of cars were therefore not specifically considered.) The point th should now be observed is this; the supreme court distinctly puts t decision upon the single ground that the Commission had power make the order in question; and refuses to rest it in any degree up the ground that the order was either wise or expedient. This a pears clearly in the following paragraphs:

"In consequence of one of the comprehensive amendments to t Ace to regulate commerce, adopted in 1906, (sec. 15, Act June 1906, 34 Stat. 589), it is now provided that 'all orders of the Co mission, except orders for the payment of money, shall take eff within such reasonable time, not less than thirty days, and shall co tinue in force for such period of time not exceeding two years, shall be prescribed in the order of the Commission, unless the sa

shall be suspended or set aside by a court of competent ju
146 diction.' The statute endowing the Commission with la
administrative functions, and generally giving effect to orders concerning complaints before it without exacting that they previously submitted to judicial authority for sanction, it becom

necessary to determine the extent of the powers which courts may exert on the subject.

"Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Telegraph Company vs. Adams, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order under our conception as to whether the administrative power has been wisely exercised.

"Power to make the order and not the mere expediency or wisdom of having made it, is the question."

The court thereupon considered and sustained two propositions: (1), The Act gave the Commission authority to regu-
147 late the distribution of company fuel cars in times of shortage as a means of preventing undue preference or undue discrimination; and (2), The order complained of was within the authority thus given. But the expediency of the order was not passed upon at all, the court saying, inter alia:

"The insistence that the necessary effect of an order, compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition, that is, that if, when coal is brought from a mine by a railroad the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tipple of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that

body to consider complaints as to violation of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

If this decision be read, as it must be, in connection with
148 the case of the Baltimore & Ohio Railroad Company and with Texas & Pacific Railway Company vs. Abilene Oil Co., the conclusion seems to be unavoidable, that complaints of unreasonable rates and of unreasonable practices (at least when such rates and practices are general, and apply to whole classes of shippers) must alike be heard in the first instance by the Commission; and that the courts have no power to entertain such complaints until the Commission's order thereon is brought before them for appropriate action. And when such an order is finally brought before a judicial tribunal, the inquiry whether the order should be suspended or set aside must be limited to considering.

"*a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, * * * whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The inquiry is not to be answered by deciding, that in the judgment of the court the order is, or is not, either wise or expedient; if the Act to regulate commerce has given the Commission power to deal with the subject, and if the order complained of is within the power, the action of the Commission is to stand.

But the foregoing cases were all concerned with rates or practices that existed when the proceedings were begun, while it is conceded that the present defendant changed the method in controversy on or about January 1st, 1906, more than a year before the suit
149 was brought. The action therefore being solely for damages, and for damages growing out of a practice that has ceased, the plaintiff insists that the decisions of the supreme court do not apply, and that section 9 of the Act gives the right to sue in the courts at the election of the injured party. Evidently, this also is a question of great importance, and the judgment of this court is not likely to have much effect upon its solution. It can only be determined satisfactorily by the supreme court, and I should not feel that I were evading my duty if I merely entered a judgment and speeded the cause on its way to an ultimate decision. But I may perhaps indicate very briefly why I think that the reasoning of these cases leads to the conclusion that the circuit court does not possess primary jurisdiction of the present case.

It can no longer be doubted, as a general proposition, that the Commission is charged primarily with the jurisdiction and the duty

to examine rates and practices, and to determine whether they conform to the Act. And it is probably safe to say also, that because of the diversity of situations and circumstances that inevitably affect rates and practices the Commission is likely to find it impossible to lay down general rules that will apply without modification to every possible dispute in a given class. Hence—to speak now only of the question in hand—the lawfulness of the defendant's practice during 1902-1905 must be determined by considering the situation and the circumstances that prevailed in the Clearfield region during the years in question. The situation being thus considered, if the practice was preferential or discriminating it violated the Act. But what tribunal is to decide whether an offence has been committed? Clearly, if the practice were now in force, the Commission; and it is I think conceded that the Commission might then not only forbid the practice in the future, but might award reparation for the injury
150 done in the past. The basis of both these orders, however, would necessarily be a finding of fact—that the practice was preferential or discriminating—and this is an administrative finding which the Commission alone seems to have the power to make in the first instance. The right to inquire into this subject has not been confided primarily to the courts, and such power of reviewing the Commission's order as the courts may possess does not extend to its wisdom or discretion.

Since, therefore, the Commission alone has the power to decide primarily whether a particular method of distributing coal cars in case of shortage is preferential, I do not believe that the power is automatically transferred to the courts as soon as the carriers substitute another method, and merely for the reason that the substitution has been made. The procedure of submitting the question of discrimination to different courts and juries has been authoritatively declared to be objectionable; but if it must nevertheless be followed in every case where the damages claimed were caused by a practice that has been changed, the uncertainty of results to which the supreme court has referred will bring about the very discrimination which the Act seeks to avoid. If one injured shipper recovers a verdict and another fails; or if one recovers a sum calculated according to a particular rule, and the sum awarded to his neighbor is calculated according to a different rule; an obvious discrimination among the claimants must result, for the theory of all the verdicts must be that the sums recovered fully repair the damages suffered, while it is evident that reparation is in fact partial or unequal. Inequality in recovery would necessarily produce discrimination. If, on the other hand, such claims must be submitted in the first instance to the Commission, they will be acted upon uniformly, will be adjusted according to the same rule—a rule that will presumably be adopted after a full and comprehensive view of the whole situation
151 and of all the relevant circumstances—and the damages will be awarded, not arbitrarily or capriciously, but by the application of the same standard. In a word, and without repeating the language of the supreme court that seems to me to justify the conclusion, I hold that the Commission has the primary jurisdiction to award reparation for such damages as may have been caused by a

preferential practice in distributing coal cars in case of shortage; a
that the circuit court has not the primary power to award su
damages, even altho they may have been caused by a practice th
did not prevail at the time when the suit was brought. If the plai
tiff's contention is sound it follows that two irreconcilable results m
come to pass. If section 9 applies to a situation like this—where t
practice complained of has ceased—a shipper who elects to sue
law is thus turning to a tribunal upon which his election may
said to confer exclusive jurisdiction of his complaint. But if anoth
shipper has previously been obliged to go before the Commission
the obnoxious practice being then in force—it is clear that this shi
per (who is seeking redress for the same wrong) has addressed t
proper tribunal, for in that event it is conceded that the Commissi
had exclusive primary jurisdiction of the subject matter. Whc
decision is to prevail? It might easily happen that after one shipp
had appealed to the Commission a carrier might give up the pra
tice—either before or after the Commission had passed upon
validity—and that other shippers might thereupon bring suits
law to recover damages, as the present plaintiff has done. If the Co
mission has no power to entertain the complaints of these shippe
because the practice has ceased—and this is the plaintiff's position
the courts must have complete jurisdiction, and must therefore
able to decide whether the practice complained of is preferenti

But, as the Commission had undoubted primary jurisdicti
152 of the complaint that was first made, does the ruling of t
Commission govern in case the practice should be sustain
in whole or in part? Or does the ruling of the court govern, in ca
the practice should be condemned, either in whole or in part? Und
the Illinois Central's case the decision of the Commission upon su
a subject is declared to be final: the wisdom or discretion of t
order is not to be reviewed by the courts; and yet a ruling that is th
adjudged to be final would nevertheless be practically subject to
view at the hands of a jury or of several juries, and might be whol
set at naught.

If it be asked—What then becomes of the power to sue for da
ages that is given by section 9 of the Act?—the answer is apparent
to be found in the following language from the Abilene Oil Co
pany's case (p. 442):

"In other words we think it inevitably follows from the context
the Act that the independent right of an individual originally
maintain actions in courts to obtain pecuniary redress for violatio
of the Act, conferred by the ninth section, must be confined to
dress of such wrongs as can, consistently with the context of the A
be redressed by courts without previous action by the Commissio
* * *"

There are wrongs to which a shipper may be subjected that do n
need previous action by the Commission. For example—to give
single illustration—isolated acts of oppression or extortion, direct
against individuals, might in all probability be redressed by suit
the election of the injured shipper. But where a practice that
applied alike to all shippers, or to all of a class, is complained of b
cause its effect is nevertheless averred to be preferential, a differe

situation is presented. There the Act has given to the Commission a primary jurisdiction over the subject matter, in order that redress may be intelligent, complete, and uniform: and this I believe to be true whether redress is sought before, or after, the practice has been given up.

153 The defendant's motion to dismiss the suit for want of jurisdiction must be granted.

(Endorsed: 102 Apr. Sess., 1908. Morrisdale Coal Co. vs. Penna. R. R. Co. Opinion. Filed Feb'y 5, 1910. Henry B. Robb, Clerk.)

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Allowance of Exception to Plaintiff.

And now, to wit, this 7th day of February, 1910, on motion of Chester N. Farr, Jr., and William A. Glasgow, Jr., attorneys for the Morrisdale Coal Company, plaintiff in the above case, the Court allows the plaintiff the following exception:

1. Exception to the action of the Court in granting defendant's motion to dismiss this suit for want of jurisdiction.

JOHN B. McPHERSON, *Judge.*

(Endorsed: U. S. Circuit Court of E. D. of Pa. No. 102 of Apr., 1908. Morrisdale Coal Co. vs. Penna. R. R. Co. Allowance of Exception for Pl'ff. Filed Feb. 8, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

154 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Entry of Judgment.

To the Clerk of the Circuit Court of the United States:

SIR: Enter judgment in the above case in favor of the defendant and against the plaintiff in accordance with the opinion of the court filed.

JOHN G. JOHNSON,
Counsel for Defendant.

February 10, 1910.

Judgment.

And now, this tenth day of February, 1910, in accordance with præcipe filed, judgment is hereby entered in the above entitled case in favor of defendant and against the plaintiff in accordance with the opinion of the Court.

Attest:

LEO A. LILLY,
Deputy Clerk.

(Endorsed: U. S. Circuit Court of E. D. of Pa. Morrisdale Coal Co. vs. Penna. R. R. Entry of judgment for defendant. Filed Feb. 10, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

155 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

Assignments of Error.

The plaintiff in this action, in connection with the petition for a writ of error, makes the following assignments of error, which it avers have occurred in the rulings of the Court, as appears by the record of this cause, to wit:

1. That the learned Court erred in sustaining the motion of the defendant to dismiss this cause for want of jurisdiction.

2. That the learned Court erred in dismissing this cause for want of jurisdiction, and in entering judgment in favor of defendant thereon.

3. That the learned Court erred in not entering judgment in favor of the plaintiff in the sum of Sixty-seven thousand, one hundred and fifty-six dollars and nine cents ($67,156.09).

4. That the learned Court erred in not affirming the plaintiff's first point which read as follows:

"1. In periods of car shortage in the Clearfield Region of the Pennsylvania Railroad, that is, when the Pennsylvania Rail-
156 road Company could not furnish all the cars required for the shipment of coal, by the coal operators or miners in the Clearfield Region, it was the duty of the Pennsylvania Railroad Company to distribute all the cars available for shipment of coal, among the shippers making requests for cars in accordance with the percentage system of distribution in effect at the time, and in making such daily distribution all the cars in the Clearfield Region available for the shipment of coal should have been counted, and the plaintiff was

ntitled each day to have assigned to its use the number of cars which its percentage of all such available cars, would award to it in accordance with the system of distribution in effect."

5. That the learned Court erred in not affirming plaintiff's second point, which read as follows:

"2. If the jury should find that the Pennsylvania Railroad Company failed to furnish to the plaintiff during the period covered by the complaint in this case, the cars to which it was entitled under its percentage for car distribution and that during the same period the defendant furnished to another shipper the full number of cars to which such other shipper was entitled under its percentage, or furnished to such other shipper more cars than it was entitled as aforesaid, then the court charges the jury that this action of the defendant subjected the plaintiff to undue or unreasonable prejudice or disadvantage, and thereby the defendant made or gave undue or unreasonable preference or advantage to such other shipper, and the plaintiff is entitled to recover such damages as it may show that it suffered by reason of such action of the defendant.

The damages should be estimated as follows:

The jury should first determine the difference in tonnage
157 between the number of cars actually given to the plaintiff in any one month, and the number to which it was actually entitled, considering all the cars actually in the Clearfield Region.

This difference in tonnage should be multiplied by the difference between the average cost to the plaintiff during that month for mining a ton of coal, and the average price per ton at which the plaintiff was compelled to purchase coal in the open market for the purpose of enabling it to fill its contracts of shipment. The result thus obtained, with interest thereon from the respective months in which damages have accrued, is the damage to which the plaintiff is entitled."

Wherefore the plaintiff prays that the judgment of the Court may be reversed.

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Plaintiff.

(Endorsed: No. 102. April Sessions, 1908. U. S. C. C. E. D. of Pa. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Assignments of Error. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., Att'ys for Pltf. Filed Feb. 10, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

158 In the Circuit Court of the United States for the Easte
District of Pennsylvania, April Sessions, 1908.

No. 102.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

To the Honorable the Judges of the Circuit Court of the Unite
States for the Eastern District of Pennsylvania:

The petition of Morrisdale Coal Company, a corporation of th
State of Pennsylvania, respectfully represents:

That it is the plaintiff in the above entitled action, and that on th
17th day of November, 1909, a special verdict was entered in th
above cause, finding in favor of your petitioner in the sum of Sixty
seven thousand, one hundred and fifty-six dollars and nine cent
($67,156.09), and reserving certain points of law for the consider
tion of your Honorable Court, as will appear from the record hereo
to which reference is hereby made.

And, as will further appear from the said record, on the 31st da
of January, 1910, the defendant herein filed a motion to dismiss th
plaintiff's case on the ground that your Honorable Court had n
jurisdiction thereof, which motion was granted by your Honorabl
Court, and the case dismissed on the 5th day of February, 1910, an
judgment was entered in favor of the defendant, all of which appea
upon the said record.

And your petitioners represent- that in such judgment an
159 the proceedings had prior thereto in this cause, certain erro
were, in the opinion of your petitioner, committed in th
said Court to the prejudice of your said petitioners, all of which wi
more fully and in detail appear with the assignments of error whic
are filed with this petition.

Wherefore your petitioner prays that a writ of error may issu
in this behalf out of the United States Circuit Court of Appeals fo
the Third Circuit, for the correction of errors so complained o
and that the said judgment may be reversed and full and comple
justice may be done to your petitioner in the premises, and that th
transcript of the record, proceedings and papers in this case, dul
authenticated, may be sent to the United States Circuit Court o
Appeals.

And, as in duty bound, your petitioner will ever pray, etc.

MORRISDALE COAL CO.,
By CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Plaintiff.

Before McPherson, J.

Petition allowed.
BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

Febr'y 10, 1910.

(Endorsed: No. 102. April Sessions, 1908. U. S. C. C. E. D. of Pa. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Petition for Writ of Error and Order of Allowance. Chester N. Farr, Jr., Wm. A. Glasgow, Jr., Att'ys for Pl't'f. Filed Feb. 10, 1910. Henry B. Robb, Clerk. By L., Deputy Clerk.)

160 Know all men by these presents, That we, Morrisdale Coal Company, as principal, and The United States Fidelity and Guaranty Company as surety, are held and firmly bound unto Pennsylvania Railroad Company in the full and just sum of two hundred and fifty dollars, to be paid to the said Pennsylvania Railroad Company, its certain attorney, successors, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of February in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a session of the Circuit Court of the United States for the Eastern District of Pennsylvania, in a suit depending in said Court, between Morrisdale Coal Company and Pennsylvania Railroad Company, a judgment was rendered against the said Morrisdale Coal Company, and the said Morrisdale Coal Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Pennsylvania Railroad Company, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia, within thirty days.

Now, the condition of the above obligation is such that if the said Morrisdale Coal Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

161 Sealed and delivered in the presence of—

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By J. WALTER ZEBLEY,
Resident Vice-President.

Attest:
FRANK M. FLYNN,
Resident Secretary.

The surety hereby waives the signature of the principal.
J. WALTER ZEBLEY, *R. V. P.*

Before McPherson, J.

Bond approved.
BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.
February 10, 1910.

162 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Henry B. Robb, Clerk of the Circuit Court of the United Stat of America for the Eastern District of Pennsylvania, in the Thi Circuit, do hereby certify the foregoing to be a true and faithf copy of the original Pleas and Proceedings in the case of the Morri dale Coal Company v. Pennsylvania Railroad Company, No. 10 April Session, 1908, on file and now remaining among the recor of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name an affixed the seal of the said Court at Philadelphia, this 18th day February, in the year of our Lord one thousand nine hundred an ten, and of the Independence of the United States the one hundr and thirty-fourth.

[SEAL.] HENRY B. ROBB,
Clerk of C. C.

163 In the United States Circuit Court of Appeals for the Thi Circuit, March Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY, Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

And afterwards, to wit, on the twenty-fourth day of March, 191 come the parties aforesaid by their counsel aforesaid, and this ca being called for argument sur pleading and briefs and the Cou not being fully advised in the premises, takes further time for th consideration of the same.

And afterwards, to wit, on the seventeenth day of November, 191 come the parties aforesaid by their counsel aforesaid, and the Cou now being fully advised in the premises, renders the following d cision:

164 United States Circuit Court of Appeals, Third Circuit, March Term, 1910.

No. 37.

MORRISDALE COAL COMPANY, Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Before Buffington and Lanning, Circuit Judges, and Bradford, District Judge.

LANNING, *Circuit Judge:*

This action was dismissed by the circuit court for want of jurisdiction. See 176 Fed. 748. It is an action by the plaintiff, Morrisdale Coal Company, to recover from the defendant, Pennsylvania Railroad Company, damages for the alleged violation of section 3 of the act to regulate commerce, approved February 4, 1887, which declares that "it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any par-
165 ticular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The claim of the plaintiff is that the distribution of coal cars amongst the mines of the Clearfield Coal Region of Pennsylvania, in which the plaintiff's mines are located, and the mines in other coal regions, during the years 1900 to 1905 inclusive, was unduly and unreasonably prejudicial and disadvantageous to the plaintiff. The rule under which that distribution was made was abolished by the railroad company on January 1, 1906, when it adopted and put into operation a new rule of distribution. The action in this case was commenced March 3, 1908, more than two years after the rule of distribution now complained of had been abolished. The judgment of the circuit court was based on its understanding of the interpretation of the act to regulate commerce by the Supreme Court in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, and two or three other cases to be later referred to.

The Abilene case was one in which an action was instituted to recover from the railroad company a sum of money equal to what the Abilene Cotton Oil Company declared was the excess over a reasonable charge which it had been compelled to pay to the railroad company for the transportation of cotton seed. It was conceded, in the opinion of the Supreme Court, that at common law such an action would lie, and that the act to regulate commerce should not

be construed as taking away the right unless such construc
166 tion was imperatively required. But taking into consider
tion the remedial provisions of the act, and the destructio
of them which would result from allowing a court and jury, witho
reference to prior action by the Interstate Commerce Commissio
to find an established rate to be unreasonable, it was decided that,
the power existed in both courts and the Commission to hear ori
inally complaints in cases of alleged preferences in rates, an esta
lished schedule of rates might be found reasonable by the Commi
sion and unreasonable by a court, and thus give rise to a confli
which would render the enforcement of the act impossible. R
ferring to action 9 of the act, which provides that any person clai
ing to be damaged by any common carrier subject to the provisio
of the act may either make complaint to the Commission or brin
suit for the recovery of damages in any district or circuit court
the United States of competent jurisdiction, but that he shall n
have the right to pursue both of such remedies, the court said "w
think that it inevitably follows from the context of the act that th
independent right of an individual originally to maintain actio
in courts to obtain pecuniary redress for violations of the act co
ferred by the ninth section must be confined to redress of suc
wrongs as can, consistently with the context of the act, be redresse
by courts without previous action of the Commission, and, therefo
does not imply the power in a court to primarily hear complain
concerning wrongs of the character of the one here complained of.

The conclusion of the court was that a shipper seekin
167 reparation predicated upon the unreasonableness of an esta
lished rate must, under the act to regulate commerc
primarily invoke redress through the Interstate Commerce Commi
sion, which body alone, it was declared, is vested with power ori
inally to entertain proceedings for the alteration of an establishe
schedule.

The plaintiff in the present case has primarily invoked redre
through the circuit court and not through the Interstate Commerc
Commission. But, since the opinion in the Abilene case dealt wit
the rule of procedure for the recovery of damages in a case of allege
unreasonable rates, while in the present case we deal with th
rule of procedure for redress in a case of an alleged unreasonabl
regulation for the distribution of cars not in operation whe
the action was commenced, the question arises whether the co
struction of the statute which excluded the Abilene case fro
the class of cases that may be primarily instituted in a court als
excludes such a case as the one now in hand. To answer the que
tion, we must determine first, whether a distinction exists betwee
the Abilene case and the present case by reason of the fact that th
action in the present case was not commenced until after the rul
complained of had been abolished, and, if not, then, second, whethe
a distinction exists by reason of the fact that in the Abilene cas
the rule complained of was one affecting rates while in the presen
case it is one concerning the distribution of cars.

As to whether the doctrine of the Abilene case is inapplicable be

cause the present action was not commenced until after the
168 rule complained of has been abolished, it is contended, as
we understand the plaintiff's argument, that at common law the Morrisdale Coal Company had a right of action against the Pennsylvania Railroad Company for damages sustained by the former company by reason of the enforcement against it of the old rule, and that the effect of the act to regulate commerce was merely to suspend that right while the rule was operative. Consequently, it is argued, the common law right of action was revived on January 1, 1906, when the new rule was substituted for the old one.

For present purposes, we deem it unnecessary to consider what right at common law, if any, the coal company may have had in the absence of the act to regulate commerce. While section 22 of the act has a clause which declares that "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," it was held in the Abilene case that that section could not "in reason be construed as continuing in shippers a common law right the continued existence of which would be absolutely inconsistent with the provisions of the act." What was really done by the Pennsylvania Railroad Company on January 1, 1906, was to change or modify its rule for the distribution of cars. If a common carrier can defeat the power of the Interstate Commerce
Commission to inquire into the reasonableness of its rates or
169 regulations by voluntarily changing or modifying them, frequent changes or modifications would very seriously impair the efficiency of the Commission and the purposes of the act. It is clear that Congress intended by the legislation embodied in the act to regulate commerce, and the amendments thereof passed prior to January 1, 1906, to confer upon the Interstate Commerce Commission very large powers in investigating the accounts and regulations of common carriers subject to the provisions of the act, and in requiring obedience to those provisions. So plenary is the administrative power of the Commission that in the Abilene case it was said that "although an established schedule of rates may have been altered by a carrier voluntarily, or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force."

It does not follow, from what has been said, that the Commission was bound, under the statute as it existed prior to 1906, to investigate every claim for damages against a common carrier founded on a violation of the statute by the enforcement of a rule not in existence when the complaint was made. Section 16 of the act, as amended June 29, 1906, declares that—

170 "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the

cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order; provided, that claims accrued prior to the passage of this act may be presented within one year."

Although previous to 1906 there was in the act no express limitation of time within which a proceeding before the Commission should be commenced, before the amendment as well as after it a claim for damages might have been barred by lapse of time. An order by the Commission to pay damages was but a recommendation. Payment could have been enforced only by an action in some court. As the court would regard the statute of limitations, the Commission would do so. Such, evidently, was the view of the Commission as to claims accrued before the amendments of 1906. Cattle Raisers' Association v. C. B. & Q. R. Co., 10 I. C. C. Rep., 83; Missouri & Kansas Shippers' Association v. A. T. & S. F. Ry. Co., 13 I. C. C. Rep., 411. The object of the limitation above quoted was to shorten the period within which claims for damages might be filed, saving, however, to any claimant whose claim had accrued more than two years before the amendment took effect a year within which to present his claim. "The intent of the proviso (in the amendment) is, in our opinion," said the Commission in Nicola, Stone & Myers Co. v. L. & N. R. R. Co., 14 I. C. C. Rep. 196, 206, "to prevent
171 such a construction of the preceding part of this provision as to cut off claims upon previously accrued causes of action as to which the two years had already run, or so nearly so that it would be impracticable for the claimants to present their claims within such period.'

We conclude, therefore, that if, except for the act to regulate commerce, the Morrisdale Coal Company would have had a common law right of action against the Pennsylvania Railroad Company for the damages here claimed, that right was not merely suspended while the old rule of distribution was in operation, but was taken away for all time and the Coal Company given a substituted right of procedure before the Commission, at any time within one year after June 29, 1906, for a determination by the Commission of the question whether the rule complained of was discriminatory, unless, indeed, the Commission has no power, under the act, to determine whether a rule for the distribution of cars is discriminatory.

In considering what power, if any, the Commission has over rules for the distribution of cars, it is to be observed that section 3 of the act declares it to be unlawful for any common carrier to subject any party to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; that section 12 authorizes and requires the Commission to execute and enforce the provision of the act; that section 12 imposes on the Commission the duty of investigating complaints concerning anything done or omitted to be done by any com-
mon carrier subject to the provisions of the act; that section
172 14 requires the Commission to make a report in writing of each of its investigations and to embody therein its decision, order or requirement, and, in case damages are awarded, the find-

ings of fact on which the award is made; that section 15 authorizes and empowers the Commission to investigate alleged unreasonable rate charges and alleged unreasonable or discriminatory regulations or practices and to prescribe what shall be just, fair and reasonable; that section 16 provides that the Commission, where upon a complaint filed under section 13 it has determined that the complainant is entitled to an award of damages, shall make an order "directing the carrier to pay to the complainant the sum to which he — entitled on or before a day named," that if payment shall not be made within the time limit of the order the complainant may commence an action in a circuit court of the United States for the recovery of his damages, and that, on the trial, the order of the Commission "shall be prima facie evidence of the facts therein stated"; and that section 10 of the amendment of March 2, 1889, authorizes circuit and district courts of the United States to issue writs of mandamus against common carriers in certain cases of violation of the act. Unless these provisions are to be restricted by construction, they seem to require the Commission not only to determine what are just and reasonable rate schedules, but, also, what are just and reasonable regulations and practices, and to ascertain and award damages, where they have been sustained, in every case in which it finds that an unjust rate schedule or an unjust regulation or practice has been in operation.

173 In Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481, a case in which the Pitcairn Coal Company applied in the first instance to the United States circuit court for the district of Maryland, after the amendments of 1906 had gone into effect, for a mandamus to compel the Baltimore & Ohio Railroad Company to alter its rule for the distribution of cars, Mr. Justice White, after referring to the Abilene case, said: "The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling, since, by section 15, as enacted by the amendment of June 29, 1906, the Commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the Commission, if it finds reason so to do, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action." And, in construing section 23 (section 10 of the amendment of March 2, 1889, concerning the power of courts to issue writs of mandamus) with the other provisions of the act, it was said: "It being demon-

174 strable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had

been previously enacted in 1889. This conclusion being in res
impossible, it must follow that, construing the provisions of sect
23 in the light of and in harmony with the amendments adopted
1906, the remedy afforded by that section, in the cases which it
braces, must be limited either to the performance of duties which
so plain and so independent of previous administrative action of
Commission as not to require a prerequisite exertion of power by t
body, or to compelling the performance of duties which plai
arise from the obligatory force which the statute attaches to ord
of the Commission, rendered within the lawful scope of its authori
until such orders are set aside by the Commission or enjoined by
courts." Accordingly, it was decided that the circuit court did
have original jurisdiction to determine the legality of the rule of
Baltimore & Ohio Railroad Company for the distribution of c
cars, and the petition for a writ of mandamus was ordered to
dismissed.

In Interstate Commerce Commission v. Illinois Central R. R. C
215 U. S., 452, the complaint was also against an alleged d
175 criminatory rule for the distribution of coal cars. There,
plication for redress was originally made to the Commissio
It made an order requiring a change in the rule. Subsequently, t
United States circuit court decreed an injunction against the enfor
ment of certain provisions of the Commission's order. In the s
preme court it was contene*de* that while section 15 of the act,
amended in 1906, confers upon the Commission authority upon co
plaint duly made to declare a rate or practice affecting rates illeg
and to establish a new and reasonable rule or practice affecting su
rates for a term not exceeding two years, it has no relation to co
plaints concerning preferences or discriminations that do not affe
rates. In other words, the contention was that the Commission h
no authority to make an order requiring a change in the rule for t
distribution of cars because such a rule does not affect rates. B
it was declared that such a construction would frustrate the ve
purpose of the act. "The antecedent construction which the Inte
state Commerce Act had necessitated," said the court, referrin
evidently to the Abilene case, "and the remedial character of t
amendments adopted in 1906, all serve to establish the want of mer
in the contention relied upon. In addition, to adopt it would requi
us to hold that congress, in enlarging the powers of the Commissio
over rates, had so drafted the amendment as to cripple an
176 paralyze its power in correcting abuses as to preferences an
discriminations which, as this court has hitherto pointed ou
it was the great and fundamental purpose of congress to further.
Accordingly, the decree for injunction was reversed.

These cases conclusively establish the doctrine that the Interstat
Commerce Commission alone has original jurisdiction to determin
whether an existing rate schedule, or an existing regulation or pra
tice affecting rates, or an existing regulation or practice of any othe
kind affecting matters sought to be regulated by the act, is unju
or unreasonable, or unjustly discriminatory, or unduly preferentia
or prejudicial, and that the courts cannot, by mandamus, injunctio
or otherwise, control or modify any order of the Commission mad

by it in the due performance of its merely administrative functions. Of course, there may be cases involving constitutional or legal rights, in which judicial questions for the determination of the courts may be presented. It is also the established doctrine that where the subject matter of the complaint is an alleged unreasonable or prejudicial rate-charge, the Commission has the power, after determining that the charge was excessive, to award damages to the complainant. In such case, the award would probably be a mere matter of calculation and would be a sum equal to the difference between the charge found to be reasonable and the charge actually made by the carrier. In a case where the alleged discriminatory rule has relation to the distribution of coal cars, it is obvious that, if the Commission sustains the complaint and prescribes what shall thereafter be a
177 reasonable rule of distribution, an award of damages to the complainant for injuries sustained under the operation of the discriminatory rule cannot be a mere matter of calculation. It has therefore been held, by a majority of the Commission, in Hillsdale Coal & Coke Co. v. Pennsylvania R. R. Co., decided March 7, 1910, that it has no authority or power to assess and determine the measure of damages in such a case as the one now before us. The view of the majority of the Commission was that the only damages it may assess are rate damages, or damages that can be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought to be charged. The same view had been previously expressed by a majority of the Commission in Joynes v. Pennsylvania R. R. Co., 17 I. C. C., 361. "As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices," said the majority through Mr. Commissioner Harlan, "and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the Commission is divided, as in the case to which we have just alluded (the Joynes case). The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant, that being a judicial question for the courts." Inasmuch, however, as the case now before this court had been decided by the circuit court before the Hillsdale Coal & Coke Company's case was decided by the Commission, it
178 concluded to hear argument on the question of damages to the end that, if the Commission should award damages, the question of its power so to do might ultimately come before the courts for their consideration.

As already suggested, the letter of the statute seems to confer upon the Commission the power to assess damages in every case of discriminatory practices. Its procedure in making the assessment constitutes no part of a judicial proceeding. In a court of law, its findings and order are but prima facie evidence of the damages sustained. We do not find it necessary, however, to decide at present the question on which the members of the Commission are divided. If judicial action shall be taken in the Hillsdale Coal & Coke Company's case, the court whose jurisdiction will be invoked will doubtless be the court from which our present case has come. We have not had the benefit of any argument on the question. It is not even suggested

in the record or briefs of this case. For the present, it is suffici
for us to say that, in our opinion, a party claiming to be injured
a discriminatory rule for the distribution of coal cars, cannot ma
tain in a court of law an action for the recovery of damages bef
the Interstate Commerce Commission has investigated the case a
determined by its report that the rule is or was discriminatory. T
determination of that question, at least, involves only the p
formance of administrative functions which, under the a
179 are to be performed by the Commission and not by any cou
Whether, after the Commission has found such a rule to
discriminatory, it is its duty to proceed to assess the damages, if an
which the complaining party has sustained, or whether they are
be recovered by an action in some court without any prelimina
assessment by the Commission, is a question which, since it has n
been argued before us and since its decision is not necessary to th
disposition of the case we now have in hand, we should not at prese
decide.

For the reasons stated, the judgment of the circuit court will b
affirmed, with costs.

Supplemental Opinion.

Before Buffington and Lanning, Circuit Judges, and Cross, Distri
Judge.

LANNING, *Circuit Judge:*

After the foregoing opinion had been prepared, but before it wa
filed, the defendant in error presented its petition for the dismissa
of the writ of error on the ground that, under the provisions of sec
tions 5 and 6 of the act establishing circuit courts of appeals, we hav
no appellate jurisdiction of this case. The provisions referred t
are—

"SECTION 5. That appeals or writs of error may be taken from th
district courts or from the existing circuit courts direct to the
180 Supreme Court in the following cases: (1) In any case in
which the jurisdiction of the court is in issue; in such case
the question of jurisdiction alone shall be certified to the Supreme
Court from the court below for decision. * * *

SECTION 6. That the circuit court of appeals established by this
act shall exercise appellate jurisdiction to review by appeal or by
writ of error final decisions in the district courts and the existing
circuit courts in all cases other than those provided for in the pre-
ceding section of this act, unless otherwise provided by law."

To the plaintiff's statement or declaration in the court below the
defendant filed the pleas of the general issue and the statute of limi-
tations. The case went to trial on the merits before the court and
a jury and a special verdict was taken in the following form:

"We find as a fact that the amount of the plaintiff's claim is
correct and is contained in its exhibit 2, and is

Principal	$51,640.60
Int.	15,515.49
Total	**$67,156.09**

Said amount being ascertained in the way and manner in said exhibit set forth together with the evidence explaining and referring to the same.

If the court shall be of opinion that the questions of law
181 involved in the case are in whole or in part with the plaintiff, judgment may be entered for the above amount or for such smaller sum as in the opinion of the Court the plaintiff may be entitled to recover.

If, however, the Court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

Concerning the requests to charge, the Court said: "The points of the plaintiff and defendant respectively are not answered specifically, and to such failure to answer the points specifically an exception is sealed both to plaintiff and defendant." In none of the defendant's points was the question of the jurisdiction of the circuit court raised. Sometime after the rendition of the verdict, and before judgment had been entered, the defendant moved that the circuit court dismiss the action for want of jurisdiction. That motion having been argued, and the circuit court having concluded that it should be granted, final judgment was entered "in favor of defendant and against the plaintiff in accordance with the opinion of the court." This judgment, which we will assume is one dismissing the action for want of jurisdiction, having been brought to this court by the writ of error which we are now asked to dismiss, the case was argued here on the assignments of error filed by the plaintiff without a suggestion from the defendant that we had no appellate jurisdiction of the case.

We think the following rules may be deduced from the adjudicated cases.

182 1. If a case in a district or circuit court is dismissed by final judgment or decree, either for want of jurisdiction of the parties or for want of power as a federal court to take jurisdiction of the subject matter, without the decision of any other question, so that the only question presented by the record is such question of jurisdiction, the judgment or decree can be reviewed by the Supreme Court only, on appeal or writ of error, with a certificate from the lower court of the question of jurisdiction.

In support of the rule as thus stated we refer to Davis & Rankin Bldg. & Man'f'g Co. v. Barber, 60 Fed., 465, where defendants demurred to plaintiff's declaration on the ground that the liability of the defendants upon the contract sued on was several and not joint, and that, being so construed, the claim against each defendant was less than the minimum sum necessary to give the court jurisdiction of the subject matter of the action, and where, the court sustaining that view and dismissing the action for want of jurisdiction, the circuit court of appeals of the seventh circuit, concluding that the case should have been taken directly to the Supreme Court, dismissed its writ of error for want of appellate jurisdiction; Cabot v. McMaster, 65 Fed. 533, where the action went to trial before the circuit court without a jury and that court, without deciding the merits of the

controversy, dismissed the action because the amount in con-
183 troversy was less than the minimum sum necessary to give jurisdiction to the court, and where the circuit court of appeals of the seventh circuit dismissed the writ of error sued out of that court for want of appellate jurisdiction; Chappel v. United States, 160 U. S., 499, where the writ of error from the Supreme Court to a district court was general and not limited to any definite question of jurisdiction and brought up the whole case, including a question concerning the constitutionality of a law of the United States, and where the Supreme Court, while retaining appellate jurisdiction because under the provision of subdivision 5 of section 5 of the act establishing circuit courts of appeal that court has such jurisdiction in any case in which the constitutionality of a law of the United States is drawn in question, said that, in order to bring a case within subdivision 1 of section 5 of the act, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to the Supreme Court; Shepard v. Adams, 168 U. S., 618, where defendant moved to set aside the service of a summons upon him, and where, the district court overruling his motion and entering final judgment against him because he chose to stand on his motion and not to plead, the Supreme Court refused to dismiss the writ of error, which had issued from it directly to the district court, and disposed of the case on the error assigned: Evans-Snider-Buel Co. v.
184 M'Caskill, 101 Fed., 658, where a plea to the jurisdiction of the circuit court was filed setting up that the defendant was not a resident of the district in which he was sued, the plea sustained and the action dismissed, and where the writ of error from the circuit court of appeals of the eighth circuit was dismissed for want of appellate jurisdiction; Excelsior Wooden-Pipe Co. v. Pacific Bridge Co., 109 Fed., 497, where, after issue had been joined on a bill to restrain infringement of certain letters patent, and after the defendants had applied to the circuit court for an order extending the time for the completion of their proofs and the complainant had moved *fro* a decree on the pleadings and papers filed in the case, the court called for argument on the question of its jurisdiction of the controversy and subsequenty, without deciding either of the motions previously made, dismissed the case for want of jurisdiction, on the ground that the case was one arising on contract and not under the patent laws of the United States and was not a case in which there was a diversity of citizenship, and where the circuit court of appeals of the ninth circuit dismissed the appeal to that court because error could not be assigned on the circuit court's refusal to extend the defendants' time for completing their proofs, nor on its refusal to enter a decree upon the pleadings, and because upon the record the question of the jurisdiction of the circuit court only was in issue—a decision concurred in by the Supreme Court which subsequently, in 185 U. S., 282, entertained an appeal and reversed the circuit
185 court. Hays v. Richardson, 121 Fed., 536, where the dismissal was on the ground that the attachment of the defendant's property, by which the action was initiated, was illegal, and

where, no other question being tried or decided in the court below, the writ of error from the circuit court of appeals of the ninth circuit was dismissed for want of appellate jurisdiction; The Steamship Jefferson, 215 U. S., 130, where a district court dismissed a libel for salvage services on the ground that there can be no lien for services in extinguishing a fire on a vessel while in a dry dock and, therefore, because the district court, as a court of admiralty, had no jurisdiction of the case, and where the Supreme Court, on an appeal taken directly to it, held that, as the question of the jurisdiction of the district court as a federal court was the only question decided by it, the direct appeal to the Supreme Court was proper; The Alliance, 70 Fed. 273, where a district court dismissed a libel in admiralty for want of jurisdiction without the decision of any other question, and where the circuit court of appeals of the ninth circuit dismissed the appeal taken to that court on the ground that it should have been taken to the Supreme Court; St. Louis Cotton Compress Co. v. Americon Cotton Co., 125 Fed., 196, where the circuit court dismissed the action because of invalid service of a summons upon the defendant and consequent want of jurisdiction of the defendant, and where the circuit court of appeals of the eighth circuit dis-
186 missed the writ of error from that court on the ground that the Supreme Court had exclusive appellate jurisdiction of the case; Board of Trade v. Hammond Elevator Co., 198 U. S., 424, where the circuit court dismissed a bill because of want of jurisdiction of the defendant by reason of invalid service of the subpœna ad respondendum, and where the Supreme Court, on an appeal direct to it, retained appellate jurisdiction; Davis v. C. C. C. & St. L. Ry., 217 U. S., 157, where the circuit court dismissed the action on defendant's objection that the attachment of its property was illegal and that the court had therefore not acquired jurisdiction of the person or the property of the defendant, and where the Supreme Court refused to dismiss the writ of error which took the cause, with a certificate of the question of jurisdiction only, directly to that court, it saying that it concurred with the views of the circuit court of appeals of the eighth circuit when, in dismissing the writ of error from that court in the same case, it declared that the case was not distinguishable, in respect of its essential characteristics, from one where there has been an illegal service of summons upon a defendant; and Lehigh Valley Railroad Company v. Cornell Steamboat Company, Claimant of Steam Tug Ira M. Hedges, decided by the Supreme Court on November 7, 1910, where a libel in admiralty was brought to enforce contribution for the damages resulting from a col-
187 lision of vessels which the libellant, by reason of a common law judgment against it, had been compelled to pay, where exceptions to the libel were filed and the libel dismissed on the ground that the district court, as a court of admiralty, had no jurisdiction to enforce such a contribution, where an appeal was taken directly to the Supreme Court, and where that court asserted its jurisdiction of the appeal.

2. If a case in a district or circuit court goes to trial or hearing on a question of jurisdiction and on the merits, and the question of

jurisdiction is one concerning either the jurisdiction of the parties or the power of the court as a federal court to take jurisdiction of the subject matter, the party dissatisfied with the final judgment or decree, whether he be plaintiff or defendant, may waive all errors on the merits and take the case directly to the Supreme Court, on appeal or error, with a certificate from the lower court of the question of jurisdiction; or, he may assign errors on the merits and on the question of jurisdiction, and take the whole case, on appeal or error, to the proper circuit court of appeals. In the latter proceeding, the circuit court of appeals may certify the question of jurisdiction to the Supreme Court and defer decision upon the other questions until the answer of the Supreme Court shall have been received.

In support of the rule as thus stated we refer to McLish v. Roff, 141 U. S., 662, where the defendant filed a demurrer to the jurisdiction of the court below, on the ground that, as it appeared by
188 the complaint that the plaintiff and defendant were both citizens of the Chickasaw tribe of Indians, the court had no jurisdiction of the parties, and also on the ground that the courts of that tribe had exclusive jurisdiction, where the court overruled the demurrer and required the defendant to proceed with the trial of the cause upon the merits, and where the Supreme Court, while dismissing the writ of error sued out of that court directly to the trial court on the ground that it was sued out before the entry of final judgment, said, however, that "when that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case"; United States v. John, 155 U. S., 109, where the board of general appraisers imposed a *guaging* charge on imported molasses, where the circuit court reversed the board on the ground that such charge had been abolished, where on a writ of error from the circuit court of appeals to the circuit court the United States assigned for error that the decisions of the board of general appraisers was final and conclusive and that the circuit court had no jurisdiction, and also assigned errors on the merits, and where the Supreme Court, after answering in the affirmative the question whether the circuit court had jurisdiction to hear and determine the points of
189 law and fact involved in the decision of the board of general appraisers, which had been certified to the Supreme Court by the circuit court of appeals, left the latter court to exercise appellate jurisdiction on the merits of the case; Crabtree v. Madden, 54 Fed., 426, where the complaint was demurred to because it did not state a cause of action, because the court had no jurisdiction of the parties, and because the plaintiff had no legal capacity to sue, where the demurrer was sustained and the action dismissed, where the writ of error brought up to the circuit court of appeals the whole case, including the question whether the complaint stated a cause of action, where, on a motion to dismiss the writ of error on the ground that the only question presented by the record was the question of jurisdiction of the court below and that the jurisdiction of the Supreme Court to review that question was exclusive, the circuit court of ap-

peals said that the writ of error brought up the whole case and that, if it should be of the opinion that the court below had jurisdiction of the subject matter and the parties, there would remain for its determination the question whether the complaint stated facts sufficient to constitute a cause of action, and where, accordingly, it refused to dismiss the writ but proceeded to consider the case and affirmed the lower court because that court had no jurisdiction; and

Wirgman v. Persons, 126 Fed., 454, where the decree in
190 favor of the complainants was appealed by the defendants and errors were assigned on the question of jurisdiction and on the merits, and where the circuit court of appeals of the fourth circuit asserted its appellate jurisdiction, notwithstanding counsel on both sides stipulated, before the argument in the circuit court of appeals was commenced, to confine themselves to the question of jurisdiction.

3. If a case in a district or circuit court is dismissed by final judgment or decree for want of jurisdiction, either after a hearing on a question of jurisdiction only or after a hearing or a trial on a question of jurisdiction and the merits, and the question of jurisdiction is not one concerning jurisdiction of the parties or concerning the power of the court as a federal court to take jurisdiction of the subject matter of the action, but is a question of jurisdiction relating to the general authority of the court as a judicial tribunal, the party dissatisfied with the judgment or decree, whether he be plaintiff or defendant, may have the judgment or decree reviewed, on appeal or error, by the proper circuit court of appeals only.

In support of this rule we refer to Smith v. McKay, 161 U. S. 355, where the defendants filed an answer to the complainant's bill averring, amongst other things, that the complainant had a plain, adequate and complete remedy at law, which objection was overruled, where the case was heard on pleadings and proofs and
191 final decree rendered against the defendants, where appeal was taken directly to the Supreme Court and error assigned on the refusal of the circuit court to dismiss the suit for want of jurisdiction, and where the Supreme Court dismissed the appeal on the ground that the objection was not the want of power in the circuit court to entertain the suit, but the want of equity in the complainant's bill; Blythe v. Hinckley, 173 U. S., 501, where one of the grounds for dismissing the bill of the complainant was that the complainant's remedy was at law and not in equity, and therefore not a decision that the circuit court had no jurisdiction as a court of the United States, and where the Supreme Court for that reason, and for another which did not involve the jurisdiction of the circuit court as a federal court, dismissed the appeal that had been taken directly to the Supreme Court; Louisville Trust Co., v. Knott, 191, U. S., 225, where a circuit court refused to order its receiver to surrender his possession of certain property to a receiver appointed by a state court, the single question being which of the two courts had acquired prior jurisdiction, and where the Supreme Court dismissed the appeal taken to that court on the ground that the case presented no question involving the jurisdiction of the circuit court as a federal tribunal, but simply its general authority as a judicial

tribunal to proceed in harmony with established rules of
192 practice governing courts of concurrent jurisdiction as between each other; Bache v. Hunt, 193 U. S., 523, where, on an intervening petition filed by Hunt in a foreclosure suit in which Bache was a defendant, Bache filed a plea to the jurisdiction of the court over the subject matter of the petition and of his person, where the circuit court overruled the plea and rendered a decree against Bache, and where the Supreme Court dismissed the appeal taken directly to that court, saying that the jurisdiction of the circuit court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States, and that the established rules of practice as to bringing in parties to ancillary or pro interesse suo proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved and United States v. Larkin, 208 U. S., 333, where a district court dismissed the information filed for the forfeiture of certain jewels on Larkin's plea to the jurisdiction of the court that the jewels had been wrongfully taken by an agent of the Government into the district where the information was filed, and where the Supreme Court dismissed the writ of error which had issued out of that court directly to the district court on the ground that the question involved was not the jurisdiction of the United States courts as such, but whether the district court in which the information was filed, or the district court in which the jewels were first found, had jurisdiction.

The first of these rules applies to a case where the lower
193 court decides nothing but a question of jurisdiction. That question may be one concerning jurisdiction of the parties (as where no valid service of a summons upon a defendant is made, or where the initial step in an action is an illegal attachment of the defendant's property), or it may be one concerning the power of the lower court, as a federal court, to take jurisdiction of the subject matter of the action (as where there is no proper diversity of citizenship of the parties, or where the matter in dispute does not exceed in value the sum of two thousand dollars, or where there is a question as to whether a claim may be enforced in a court of admiralty).

The second rule applies to a case where there has been a decision in the lower court on the merits and also on a question concerning that court's jurisdiction of the parties, or concerning its power to take jurisdiction of the subject matter of the action.

The third rule applies to a case where the lower court has decided a question of jurisdiction, either with or without deciding the merits, such questions of jurisdiction being one concerning its general authority as a judicial tribunal, and not a question concerning jurisdiction of parties or of subject matter; as, for example, whether a remedy should be sought at law or in equity, or which of two courts having concurrent jurisdiction first acquired jurisdiction, or which of two federal courts of equal rank but in different localities has jurisdiction.

The case now in hand went to trial on the merits. The jury
passed upon the merits by rendering a special verdict award-
194 ing damages for the plaintiff against the defendant, if the court should be of the opinion that the law was with the

plaintiff, and, if it should be of the opinion that the law was with the defendant, then giving its verdict to the defendant. The circuit court concluded that the Interstate Commerce Commission had original jurisdiction in the case, and therefore, it refused to enter judgment for the plaintiff on the special verdict and entered judgment dismissing the action for want of jurisdiction. The question of jurisdiction was one concerning the jurisdiction of the circuit court as a federal court. Errors were assigned on the question of jurisdiction and also on the merits. The errors assigned were that the circuit court erred (1) in dismissing the action for want of jurisdiction; (2) in dismissing the action for want of jurisdiction and entering judgment in favor of defendant; (3) in not entering judgment in favor of the plaintiff for the sum of $67,156.09; (4) in not affirming the plaintiff's first point by charging the jury as to the duty of the Pennsylvania Railroad Company concerning the distribution of cars; and (5) in not affirming the plaintiff's second point by charging the jury as to the method of ascertaining the damages sustained by the plaintiff. In the argument in this court on the errors assigned counsel for the plaintiff contended that the circuit court had jurisdiction of the case, that the defendant's rule for the distribution of cars illegally discriminated against the plaintiff, and that the damages sustained by the plaintiff were the full amount
195 named in the special verdict. The defendant, on the other hand, contended that the circuit court did not have jurisdiction of the case, that, if it did, still the plaintiff offered no evidence from which a jury could find that it did not receive all the cars it would have been entitled to under such a rule as that for which it contended, that the defendant's rule for the distribution of cars was not illegally discriminatory, and that the method by which the damages were estimated by the jury was erroneous. Both parties argued at length both the question of jurisdiction and the questions concerning the merits. This they properly did because those questions were presented by the assignments of error. Had we concluded that the circuit court erred in dismissing the action for want of jurisdiction, it would have been our duty not only to reverse the judgment of the circuit court but to decide whether the plaintiff was entitled to judgment on the special verdict. The case comes therefore within the provisions of the second rule above given. The defendant had the right to assign errors on the merits and on the question of jurisdiction and to bring the whole case to this court. This it did. Consequently, the case is properly here and the motion to dismiss the writ of error must be denied.

(Endorsed: 1352. Morrisdale Coal Company vs. Pennsylvania Railroad Company. Opinion. Lanning, C. J. Received & Filed Nov. 17, 1910. Saunders Lewis, Jr., Clerk.)

196 March Term, 1910.

No. 37.

MORRISDALE COAL CO.
vs.
PENNSYLVANIA RAILROAD CO.

BUFFINGTON, *J.*, dissenting:

As this court's own jurisdiction over this case is here involved, and I firmly believe it has no jurisdiction, I deem it my duty to record my dissent. In the court below the Morrisdale Coal Co. brought suit against the Pennsylvania Railroad. The railroad was an interstate carrier and the plaintiff coal company required cars for interstate coal shipments. The Pennsylvania Railroad furnished coal cars to different coal regions, over its system, one of which was the Clearfield region in which plaintiff's mines were located. Plaintiff alleges the railroad "failed and refused to assign to the Clearfield coal region for use therein the fair proportion of the entire number of coal cars of said railroad company to which said region was entitled." That raised the question of the regulation of car division between different coal regions of the Pennsylvania Railroad system. The daily production capacity of the Clearfield region was rated at eighteen to nineteen thousand tons of coal and the statement alleged the railroad failed to furnish on demand "the plaintiff's due proportion or daily allotment of cars which were or should have
197 been assigned to shippers in the said Clearfield coal region for the transportation of coal." The plaintiff therefore alleged that "by the failure on the part of the defendant to give the plaintiff its proper allotment of cars during the period aforesaid, undue and unreasonable preferences and advantages were given to the other mines and collier-s in the said Clearfield coal region and to shippers in other coal regions, over the plaintiff, in that said mines and collieres were thereby accommodated with car supply and facilities for the shipment of coal greater than that which should be proberly allotted to them when compared with the facilities allotted to the plaintiff. The case proceeded to trial and on November 17, 1909, a special verdict for the plaintiff was found, subject to the court's determination of the law. On November 29, the plaintiff moved for entry of judgment on this verdict. Pending this motion, which was never disposed of, the defendant moved the court on January 31, 1910, to dismiss the action for want of jurisdiction, its motion being as follows: "And now, this thirty-first day of January, 1910, the defendant moves the court to dismiss this action for want of jurisdiction to entertain the same." This motion to dismiss the court below, in an opinion reported at 176 Fed. Rep. 748, and in which the question of jurisdiction alone was discussed, held the suit involved the proper car regulation and car distribution of the railroad; that this
was an administrative question for the Interstate Commerce
198 Commission and the circuit court was without jurisdiction. Its opinion, which as we have said, neither discussed nor dis-

posed of the merits of the case or the plaintiff's motion for judgment, concluded with the statement: "The defendant's motion to dismiss the suit for want of jurisdiction must be granted." Thereafter the defendant filed a præcipe as follows: "Enter judgment in the above case in favor of the defendant and against the plaintiff in accordance with the opinion of the court filed," and in pursuance thereof judgment was entered as follows: "And now, this Tenth day of February, 1910, in accordance with præcipe filed judgment is hereby entered in the above entitled case in favor of the defendant and against the plaintiff in accordance with the opinion of the court." On motion of plaintiff's counsel the court allowed the plaintiff the only exception asked for, viz.: "Exception to the action of the court in granting defendant's motion to dismiss this suit for want of jurisdiction."

It will thus be seen that the court heard, decided and decreed no question save that of jurisdiction, and was in a position to certify that the only question in the case was one of jurisdiction. Under such facts to what court did a writ lie to review such jurisdictional judgment. If plain words can point out plain paths, section 5 of the Act of March 3, 1891, makes the supreme court in such case the sole reviewing tribunal, for it provides "That appeals or writs of error may be taken from the district court or from the existing circuit courts direct to the supreme court in the following cases;
199 (1) In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." Now the case in hand falls literally within this provision; the jurisdiction of the court below was in issue; it was challenged by a motion to dismiss for want of jurisdiction; that issue was decided; a judgment was entered dismissing the case for want of jurisdiction and exception was taken to the judgment dismissing for want of jurisdiction. United States vs. Jahn, 155 U. S. 112, was a case where, as here, jurisdiction was in issue, and the decision was against jurisdiction. The case went direct to the supreme court and was said by that court in speaking of its jurisdiction to review under section 5; "If in such a case a final judgment were rendered because of want of jurisdiction, that judgment could be reviewed by this court upon a certificate of the circuit court, while if the jurisdiction were sustained and the merits adjudicated, although the question of jurisdiction might be brought up directly, the circuit court of appeals would undoubtedly have jurisdiction to review the case upon the merits."

The extract quoted above covers exactly the case in hand. The court below entered judgment for the want of jurisdiction, and therefore the writ *law* direct to the Supreme Court. Had the circuit court sustained jurisdiction and passed on the merits, the defendant would have had alternative remedies, but that state of facts
200 never arose, hence the writ lay to the supreme court and that court alone. The authority of United States vs. Jahn has not been question- or qualified in any subsequent case. It is true, as stated by Judge Sanborn in St. Louis Co. vs. American Co., 125 Fed.

Rep. 199, there are expressions in some later opinions of the supreme court that the jurisdiction by section 5, supra, is "the jurisdiction of the Circuit and District Courts as such (Mexican Central Ry. Co. vs Echman, 187 U. S. 432, 23 Sup. Ct. 212), and that 'appeals or writs of error may be taken directly from the circuit court to this court in cases in which the jurisdiction of those courts is in issue,—that is their jurisdiction as federal courts—the question alone of jurisdiction being certified to this court' (Blythe v. Hinckley, 173 U. S. 501," but as he well says "* * * These statements have never been crystallized into a settled proposition of law, and they have never formed the basis of any decision. * * * That section does not limit the question of which it treats to those which condition the jurisdiction of the federal courts as such as distinguished from those which condition the jurisdiction of all courts. It is broad and general in its terms. It contains no exception, and, as the Congress made no exception, the legal presumption is that it intended to make none, and it is not the province of the courts to enact one. * * *

201 Where the complainants failed in the circuit court and the supreme court refused to review their failure, they failed, not for want of jurisdiction in the trial court, but for want of equity, for want of facts constituting causes of action, for want of merits in their cases. * * * Our conclusion is that the supreme court has jurisdiction under section 5 of the act creating the circuit courts of appeals to review by writs of error or appeals taken directly to that court from the United States circuit court every question which involves the jurisdiction of the latter court, whether that question is peculiar to the federal courts as such or common to all courts * * * The result is that this writ of error was sued out to review a judgment of a circuit court which sustained an objection to its jurisdiction and dismissed the action on that ground, that the supreme court had jurisdiction to review that judgment by writ of error direct to the circuit court, and therefore this court has no such jurisdiction." This decision was cited and followed in the eighth circuit and a writ of error dismissed in Davis vs. Cleveland Co., 156 Fed. Rep. 774, the court saying the supreme court alone had power to review the case, the latter case was then taken to the supreme court, which court refused to dismiss the writ and decided the case as reported in 217 U. S. 172. In its opinion that court approved the decision of the lower court, saying: "For these propositions the court cited Board of Trade vs. Hammond Elevator Co., 198 U. S. 428; United States vs. Jahn, 155 U. S. 109; St. Louis Cotton Compress Co. vs. American Cotton Co., 125 Fed. Rep. 195; and, as we

202 have seen dismissed the case on the ground that this court alone had the power to review the decision of the circuit court. We concur in the views of the circuit court of appeals, for which also may be cited Kendall vs. American Automatic Loom Co., 198 U. S. 477." In view therefore of the supreme court exercising jurisdiction in the Davis and Kendall cases which involved questions common to all courts, and of its citing in support of its action St. Louis Co. vs. American Co., we are warranted in regarding the holding in the latter case that section 5 "does not limit the questions of which it

treats to those which condition the jurisdiction of the federal courts as such as distinguished from those which condition the jurisdiction of all courts," as a construction approved by the supreme court.

In the light of these decisions it is clear the supreme court and that court alone could review the judgment in this case, and that the motion in the circuit court of appeals to dismiss for want of jurisdiction should prevail. Its refusal to dismiss is justified by the majority opinion on the ground that the plaintiff brought the case here for review on the merits as well as the jurisdictional question. The answer to that contention is simply that the case is not before this court on the merits, and this for the simple reason that the court below did not pass on the merits and there is therefore nothing to review but its judgment against the plaintiff for want of
203 jurisdiction. The error of the assumption that the case is before this court for review of the merits is shown by the fact that this court does not dispose of the merits or discuss them in its opinion, but affirms the judgment of the court below and holds it rightly decided the case on the question of want of jurisdiction. It seems to me the plain duty of the court of appeals to dismiss this case for want of jurisdiction, and because it has assumed a jurisdiction the law vests in the supreme court alone, I am constrained to record this my dissent.

(Endorsed: 1352. Dissenting Opinion. Received & Filed Nov. 17, 1910. Saunders Lewis, Jr., Clerk.)

204 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1352 (List No. 37).

MORRISDALE COAL COMPANY, Plaintiff in Error,
vs.
PENNSYLVANIA RAILROAD COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed with costs.

W. M. LANNING,
Circuit Judge.

(Endorsed: 1352. Order Affirming Judgment. Received & Filed Dec. 20, 1910. Saunders Lewis, Jr., Clerk.)

205 In the Circuit Court of Appeals for the Third Circuit, Mar
Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

This cause, being heard upon the record and argument of couns
both upon the merits and upon the jurisdiction of the Circuit Cou
to entertain the action, and the record presenting for necessary co
sideration the proper construction of the Act to Regulate Commer
and the claim of jurisdiction in the Circuit Court not resting sole
upon diversity of citizenship of the parties, and this Court being
opinion that the sound construction of the different provisions of t
Act to Regulate Commerce as amended and now in force necessari
forbid the exercise of jurisdiction in this case by the Circuit Cou
it is adjudged and ordered that the judgment of the Circuit Cou
dismissing the case, be affirmed and that the defendant recover
the plaintiff its costs in this behalf expended.

W. M. LANNING,
Circuit Judge.

(Endorsed: 1352. Judgment affirming Judgment of Court b
low. Received & Filed Jan. 10, 1911, Saunders Lewis, Jr., Clerk.)

206 In the United States Circuit Court of Appeals for the Thi
Circuit, March Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

To the honorable the judges of the said court:

Your petitioner, Morrisdale Coal Company, appellant in the abo
entitled cause, conceiving itself aggrieved by the final decree of th
Court rendered on the 10th day of January, 1911, in favor of app
lees in the above entitled cause, does hereby appeal from said decr
to the Supreme Court of the United States for the reasons specifi
in the assignments of error, which is filed herewith.

Wherefore your petitioner prays for an order that said appeal m
be allowed and that a transcript of the record, proceedings and pape
upon which said decree was made, duly authenticated, may be se
to the Supreme Court of the United States.

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Solicitors for Petitioner.

207 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

The above appellant having prayed an appeal from the decree rendered by this Court in the above entitled cause on the 10th day of January, 1911, to the Supreme Court of the United States, and said appellant having filed with the Clerk of this Court its petition for appeal, together with the assignments of errors, and an appeal bond, which bond has been duly approved by the Court:

It is ordered, adjudged and decreed by the Court that such appeal be granted and allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

The foregoing is hereby approved for entry this eleventh day of January, 1911.

W. M. LANNING,
Circuit Judge.

208 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1910.

No. 1352.

MORRISDALE COAL COMPANY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

Appeal Bond.

Know all men by these presents, That Morrisdale Coal Company, as principal, and Fidelity & Deposit Company of Maryland as surety, are held and firmly bound unto the said Pennsylvania Railroad Company, in the sum of Five hundred dollars ($500.00) to be paid to the said Pennsylvania Railroad Company, for the payment of which well and truly to be made, we hereby bind ourselves, our successors, heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals this 11th day of January, in the year of our Lord, one thousand nine hundred and eleven (1911).

Whereas the above named Morrisdale Coal Company has prosecuted an appeal to the Supreme Court of the United States to
209 reverse the decree rendered in the above entitled cause by the United States Circuit Court of Appeals for the Third Circuit, on the 10th day of January, 1911;

Now therefore, the condition of this obligation is such, That the above named Morrisdale Coal Company shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their said appeal, then this obligation shall be void otherwise the same shall remain of full force and virtue.

In witness whereof the above named appellant, as principal, and Fidelity & Deposit Company of Maryland as surety, have hereunto set their hands and seals this 11th day of January, 1911, the said principals acting herein by Frank H. Wigton, President, their duly authorized solicitor and attorney.

THE MORRISDALE COAL CO.
FRANK H. WIGTON, *Pres.*
FIDELITY & DEPOSIT CO. OF MD.
HERMAN HOOPES,
[SEAL.] *Resident Vice Pres't.*

Attest:
F. E. TOWNSEND,
Resident Secretary.

Bond approved and accepted, this eleventh day of January, 1911

W. M. LANNING, *Judge.*

210 UNITED STATES OF AMERICA, *ss:*

To the Pennsylvania Railroad Company:

You are hereby cited and admonished to be and appear at the Court Room of the United States Supreme Court at Washington D. C., on the — day of —— 1911, pursuant to an appeal allowed and granted by the United States Circuit Court of Appeals for the Third Circuit, in the cause of Morrisdale Coal Company, as appellant and Pennsylvania Railroad Company, as appellee, to show cause, if any there be, why the decree of the United States Circuit Court of Appeals for the Third Circuit, rendered on the 10th day of January 1911, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 11th day of January, 1911.

W. M. LANNING, *Judge.*

We hereby accept service of the above citation, this 11th day of January, 1911.

JOHN G. JOHNSON,
Att'y for the Pennsylvania Railroad Company,
Per B. O. FRICK.

211 In the Supreme Court of the United States, — Term, 191–.

No. —.

MORRISDALE COAL COMPANY, Appellant,
vs.
PENNSYLVANIA RAILROAD COMPANY, Appellee.

Appeal from the United States Circuit Court of Appeals for the Third Circuit.

Assignments of Error.

And now, on this 11th day of January, 1911, comes the appellant in the above entitled cause, Morrisdale Coal Company, by William A. Glasgow, Jr., and Chester N. Farr, Jr., its solicitors, and says that in the decree rendered by the United States Circuit Court of Appeals for the Third Circuit, in the above entitled cause, on the tenth day of January, 1911, and in the record and proceedings in said cause in said Court, there is manifest error as set forth in this, its petition for appeal.

I.

That the said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, sustaining the motion of the defendant to dismiss this cause for want of jurisdiction.

212 II.

That the said Circuit Court of Appeals erred in failing to adjudge and decree that the Circuit Court had jurisdiction of this cause.

III.

That the said Circuit Court of Appeals erred in failing to direct the Circuit Court to enter judgment in favor of the plaintiff in the sum of Sixty-seven thousand, one hundred fifty-six dollars and nine cents ($67,156.09).

IV.

That the said Circuit Court of Appeals erred in sustaining the judgment of the Circuit Court, and in failing to direct that in periods of car shortage in the Clearfield Region of the Pennsylvania Railroad, that is, when the Pennsylvania Railroad Company could not furnish all the cars required for the shipment of coal by the coal operators or miners in the Clearfield Region, it was the duty of the Pennsylvania Railroad Company to distribute all the cars available for shipment of coal among the shippers making requests for cars in accordance with the percentage system of distribution in effect at the time, and in making such daily distribution all the cars in the Clearfield Region available for the shipment of coal should have been counted, and the plaintiff was entitled each day to have assigned to

its use the number of cars which its percentage of all such available cars would award to it in accordance with the system of distribution in effect.

213 V.

That the said Circuit Court of Appeals erred in sustaining the judgment of the Circuit Court, and the action of the Circuit Court, in failing to direct that if the jury should find that the Pennsylvania Railroad Company failed to furnish to the plaintiff during the period covered by the complaint in this case, the cars to which it was entitled under its percentage for car distribution and that during the same period the defendant furnished to another shipper the full number of cars to which such other shipper was entitled under its percentage, or furnished to such other shipper more cars than it was entitled as aforesaid, then the court charges the jury that this action of the defendant subjected the plaintiff to undue or unreasonable prejudice or disadvantage, and thereby the defendant made or gave undue or unreasonable preference or advantage to such other shipper, and the plaintiff is entitled to recover such damages as it may show that it suffered by reason of such action of the defendant. The damages should be estimated as follows: The jury should first determine the difference in tonnage between the number of cars actually given to the plaintiff in any one month, and the number to which it was actually entitled, considering all the cars actually in the Clearfield Region. This difference in tonnage should be multiplied by the difference between the average cost to the plaintiff during that month for mining a ton of coal, and the average price per ton
214 at which the plaintiff was compelled to purchase coal in the open market for the purpose of enabling it to fill its contracts for shipment. The result thus obtained, with interest thereon from the respective months in which damages have accrued, is the damage to which the plaintiff is entitled.

Wherefore the above named appellant in the above entitled cause, viz: Morrisdale Coal Company, prays that the said decree of said United States Circuit Court of Appeals for the Third Circuit, rendered in the above entitled cause on the 10th day of January, 1911, be reversed; and that this Honorable Court will enter on the record such order and decree as may be meet and proper in the premises.

CHESTER N. FARR, JR.,
WM. A. GLASGOW, JR.,
Counsel for Morrisdale Coal Company.

(Endorsed: In the U. S. C. C. A. 3rd Circuit. Morrisdale Coal Company, Appellant, vs. Pennsylvania Railroad Company, Appellee. Appeal. Received & Filed Jan. 11, 1911. Saunders Lewis, Jr., Clerk. Wm. A. Glasgow, Jr., pro Petitioner.)

15 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of ppeals, for the Third District, do hereby Certify the foregoing to e a true and faithful copy of the original record and proceedings in his Court, in the case of Morrisdale Coal Company, Plaintiff in rror, vs. Pennsylvania Railroad Company, Defendant in Error, on le, and now remaining among the records of the said Court, in my ffice.

In Testimony Whereof, I have hereunto subscribed my name and ffixed the seal of the said Court, at Philadelphia, this 13th day of anuary in the year of our Lord one thousand nine hundred and leven and of the Independence of the United States the one hundred nd 35th.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, Jr.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

[Endorsed:] No. —. — Term, 191–. United States Circuit ourt of Appeals. Third Circuit. Certified Copy.

Endorsed on cover: File No. 22,486. U. S. Circuit Court Appeals, 3d Circuit. Term No. 488. Morrisdale Coal Company, appellant, vs. Pennsylvania Railroad Company. Filed January 21st, 911. File No. 22,486.